No. 6.

Contracts.

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Contracts.

(1.)

A contract, as known to the common law, is "an agreement, between two or more parties, upon sufficient consideration, to do, or not to do, a particular thing." 2 Bl. 442.

Powell defines it to be "a transaction, in which each party comes under an obligation to the other, and each acquires a right to what is promised by the other." 1 Pow. on C. 7.

The term includes, as well agreements executed, (E. G. feoffments, gifts, grants, leases, &c as those which are executory. (E.G. covenants promises, &c): There being, in both a consent of the parties to an agreement, respecting some property or right, which is the subject of the stipulation. 1 Pow. 7.

The requisites to a contract, are I. Parties; II. Mutual consent to some stipulation. III. An obligation to be created, or dissolved. 1 Pow. 7.

(2.)

Of the Assent of the Parties, and who may bind themselves by their Assent

The Assent of the Parties is of the essence of every contract. Without it, there can be no agreement, and of course, no obligation created, or dissolved. 1 Pow. 7. 2 Bl. 442.

Hence a Person non compos mentis, as an idiot, a lunatic, cannot, regularly make a binding contract. He has no understanding; and therefore, in legal judgment, no Will. In general, contracts not of record, made by such persons, are actually void (says Powell): And the better

opinion." he says, is, that, "non est factum may be pleaded to them. 1 Bow. 11. 12. 4 Co. 123. 125. 2 Roll. 728. Show. P. C. 182. Sed vide 4 Bac. 87. 4 Co. 123 &c. They seem, however, to be void, as to some intents; not as to all. (Post 4, and infra.)

Thus the surrender of a particular estate, by a person non compos mentis does not destroy a contingent remainder, depending upon it. strictly void, to this purpose. 1 Bow. 12. 3 Mod. 295. 301. Salk. 570. 2 Ray. 318. 3 Lev. 284. 2 Vent. 198. Leath. 211. 250. 435. Comb. 438. 458.

See Hen. Dings, 67. Sed Qu. Whether non est factum can be pleaded to such persons deed? Esp. 223. Sal. 695. 4 Co 123. Str. 1104. 3. C. Bull. 172. The opinions are contradictory: But if not; the deed may, still, be void.

3. But persons insane are competent to receive property, by a derivative title: Ex. by gift, devise, &c., as well as by descent. There being, it is said, a "presumed assent" to what in common presumption is thus beneficial to the party. 1 Bow. 12. 13. Co. L. 2. b. 3 Bac. 84. 2 Vent 203.

Would it not be more proper to say that in such cases the Law dispenses with the assent required in other cases?

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If of the insane devisee, or donee, recovers his understanding and then agrees to the purchase; his assent becomes binding: - But if he dies during his insanity - or having recovered his understanding, dies without agreeing to it; his heirs may avoid it, 1 Bom. 13. Co. L. 2. 2 Vent. 263. - or affirm it.

But to contracts, made by a person, non compos, to aliene his property, or to create any obligation upon himself, there is no such presumed assent; nor is a legal assent dispensed with. (1 Bom. 14. - These fall within the general rule, that their covenants are void.

As to these, however, it appears to be a rule of the Common Law, that the person non compos, cannot himself, on recovering his understanding, take advantage of his former incapacity. "No man of full age, shall disable his own person"; or as it is frequently expressed, "stultify himself." 1 Bom. 14. 20. Cro. E. 398. 622. 4 Co. 123. 1 Hawk. 4 c. 3. 3 Bac. 87. Litt. Sec. 405. - Jed vide Bull. 172. Str. 1104. 2 Vent. 198. and Quere. (4.)

To this intent, therefore, they are not void.

This rule is founded on supposed reasons of Policy; to prevent fraud, by pretended insanity. 1 Bom. 20. 3 Bac. 87. 4 Co. 124-5.
But after the death of such insane person, his heirs or executors, may, at com. law avoid his contract, of this description. 3 Bac. 87. 4 Co. 124-5. H. N. B. 202. Cro. El. 398.
Rule in Con. that one may avoid his own Error insanity. 3 Day. 90.

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There are two modes also, in which such contracts may be avoided during his life, by the the English law. I. After Office found, upon the writ, de idiota inquirendo, or de lunatico &c, the King, as Parens Patriae, may, by Scire facias, during the party's life, avoid all alienations, gifts, and other acts in fais, (i.e. not of record), of the idiot &c during his incapacity. This Office found has relation to the commencement of the disability; (1 Bom. 24. 26. 27. Jenk. 40. 4 Co. 125. b. 8 Co. 170. 3 Bac. 88-9). And thus contracts, made before Office found, are avoided.

II. A Suit may be brought in Chanc.y for the same purpose, by the Attorney General, or the Committee of the Party; and the non compos should not be a Party. (1 Bom. 26-7. 2 Vern. 414. 3 P. W. 145. 111. 3 Atk. 170. 1 Eq. Ca. ab. 279. For he may not stultify himself. See vide 1 Eq. Ca. ab. 279.

But if a Suit in Chanc. is brought, in behalf of a lunatic, to compel performance of a contract made with him while sane, he ought to be a Party. For the Suit is not brought to stultify him or to take advantage of his incapacity; but to enforce his claim. The committee is but his bailiff. 1 Bom. 28-9. 1 Chan.y Ca. 153.

If a lunatic makes a contract in a lucid interval, he and his representatives are bound by it. 1 Bom. 27. 3 Bac. 89. Dy. 263. 4 Co. 125. a. 2 Vern. 412. 414.

(2) The lunatics and idiots are bound, like other persons, by acts, and contracts, of record: Ex. Gr. fines, and recoveries. - Not avoidable by their heirs or in any other way. For no averment can be admitted agt the record. 1 Bom. 21-2. 4 Co. 124. Ca. L. 247. 10 Co. 42. 3 Bac. 88.

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Note, an idiot is a natural fool; a person who has had no understanding, from nativity. (1 Bl. 303. 3 Bac. 79.) It is said that one who has any understanding; as one who can tell his age, his parents, the day of the week, or count twenty, is not an idiot. 1 Bl. 304. Yelv. 3. 233. 3 Bac. 79.

A lunatic is one who has had understanding, but has lost it, from some subservenient cause. 1 Bl. 304. Co. L. 247. 3 Bac. 80. 4 Co. 125.

Drunkenness, though operating as a temporary insanity, is not, of itself, in law, or equity, a ground, on which one can avoid his contract. It is his own fault. The rule is founded in policy. - 1 Pow. 29. 30. 2 P. W. 131. 1 Ves. 19. 1 Fonb. 82. 2 Lev. 402. - Jed rule Bull. 172. contra. "Pow. of Contracts" 31

But if one party drains the other into a state of deep intoxication, and then obtains a contract from him; Chan.r will set it aside 1 Pow. 30. 38. W. 131. - For in such case, the contract is procured by fraud. 7

A party's being of weak understanding is not per se, a sufficient reason, for avoiding his contracts. The law does not distinguish between the subordinate degrees of wisdom and weakness in the minds of men. The only distinction it recognises, is between minds sane, and non-sane. Same rule in Chan.r. 1 Pow. 30-1. 3 P. W. 129. 1 Fonb. 50. 93. 95. "Pow. of Cont." 32

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Secus, in Equity, if any fraud, or imposition, is practised on a person, thus circumstanced. — And if, where such a person is Party, there are circumstances, warranting a suspicion of fraud; Chan.r will generally relieve, on the ground of fraud. 1 Vern. 31. 3 P. W. 129. 2 Vern. 228.

(8.)

Infants.

Upon the same general Principle, viz, want of capacity to assent, contracts, made by infants, except, in some cases, for necessaries, &c, are regularly, not binding. And the exception itself is founded in necessity only; admitted on no other principle. 1 Vern. 32. 59. Infants, in judgment of law, have no discretion — no mental power of assenting to contracts. — For the distinctions, see "Parent and Child"

Femes Covert.

p. 10. The contracts of a feme covert, are also regularly void, for want of a moral capacity to assent. Her will being subject, in presumption of law, to her Husband's. Hence, her contracts, in general, bind neither him, nor herself. (1 Vern. 59. 112). But there are other grounds, on which her disability principally rests, viz. Her want of property, or of controul over it, and Husband's rights. 1 Vern. 93.
For the distinctions, see "Husband and Wife".

Who may, by their assent to contracts, bind others, as well as themselves

p. 11. If tenant in tail agrees to alienate his land, he is bound by the contract, tho' to the disherison of the issue in tail. And Chan.r will compel him to levy a Fine, and convey, according to contract. For the inheritance is in his power; and tenancies in tail are not fa-

vouned. 1 Pow. 112. 1 Ch. Ca. 171. - p. 3.

The Cestui que trust of an estate, may, by an agreement, to which the trustees are not parties, bind them, as well as his own interest: — And the trustees may be compelled, in Chan.y, to join in executing the agreement. 1 Pow. 112. 113. 1 Ch. Ca. 173. 208. — For the beneficial interest is in the former, the trustees are mere depositaries of the legal title for his use.

A trustee may, also, under some circumstances, bind the estate of the Cestui que trust: As by a conveyance to one having no notice of the trust. 1 Pow. 113. 1 J.R. 735. 7 J.R. 3. 47. 683. 8 J.R. 516. 176. Bl. 334. 447. Pow. M. 295. For a purchaser bona fide, of the legal title, is not to be affected by a right, of the existence of which he had no notice. He has equal equity, and the title, at law. —

So, an ancestor, seised in fee, may, by an agreement to alienc his estate, bind his heir; and the latter, after the former's death, may be compelled to convey. (*Note. And the purchase-money will go, regularly, to the personal representatives of the ancestor). 1 Pow 113. 2 Vern. 213. - vide "Powers of Chancery" — For, at the time of the contract, the estate was absolutely the ancestors. The heir had then no sort of title to it. The purchasers claim is, therefore, in equity, the prior and better one.

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And an agreement to convey an inheritance made by tenant for life, may be enforced in Chan.ry ag.t the heir, where the agreement, at the time of making it, was clearly advantageous to the latter. 1 Forr. 115. 118. 4 Br. P.C. 435.

A mother, acting as administratrix to her Husb.d, may, under special circumstances, bind her minor children, in Equity. 1 Forr. 123. 1 Vern. 210. — The Chancellor in such cases, exercises a discretionary power, as being, derivatively, from the king, the paramount guardian of all infants.

So, the contract of a woman, before marriage, will in general, bind the Husb.d whom she afterwards marries. 1 Forr. 123. 2 Ver. 448. 1 Roll. 357. 10 Mod. 150. 1. 243. — For, as he takes her property, or the use and control of it, and as the marriage suspends her original sole liability; he ought to assume her responsibilities. He takes her cum ~~onere~~. — "Husband and Wife".

D. F. At law, the real estate of a feme covert cannot be aliened, except by fine, or common recovery. But the agreement of Husb.d to convey her real estate, (if consented to, by her, upon a private examination) may be enforced in Chan.ry. An agreement by Husb.d alone, cannot be. 1 Forr. 124. See. "Husb.d and Wife" see Pre. Ch. 70. Amb. 495. 8 Ves. 505. 514. 2 Jacob & Walk. 412.

If tenant in tail agrees to convey the inheritance, and dies; his issue cannot be compelled to execute the agreement, tho' the tenant might have been. They claim from the donor, per formam doni; and tho' the tenant might have docked the entail; yet, he not having done it, his bare agreement cannot deprive them of their legal right. 1 Vern. 125. Prec. 238-9. 2 Vent. 350. Hob. 203. Ch. Ca. 171. Fr. Ch. 278. 2 Ves. 634. p. 8.

Secus, if the issue receives the consideration, for which the ancestor agreed to convey. The former, by this act, accepts, and takes benefit of, the agreement; and is, therefore, bound, in conscience, to execute it on his part. 1 Vern. 125. Ch. Ca. 171.

And an agreement by tenant in tail, to dispose of the lasting improvements, or permanent products, of the estate, cannot be enforced ag.t his issue, after his death; tho' it might have been ag.t himself. E.G. an agreem.t to fell timber trees. 1 Vern. 127. 1 Eq. Ca. 50. Toph. 194.

The executors and administrators of every person, are "implied in himself"; and are, in general, bound, by his contracts, of course, without being named. 1 Vern. 128. 2 P. W. 197. (Vide. "Exec.rs" "Admin.rs" "Covenant".

An agent, or attorney, being duly authorized, may, by agreement in the principal's name, bind his principal, and will not himself be bound. 1 Vern. 128. 3 P. W. 277. 2 Eq. Ca. abr. 31. 5 Bro. P.C. 547. Vide. "Master and Servant". "Title by Deed." 35 (12.)

But if an attorney &c makes, in behalf of his client, a contract, which he is not authorized to make; the attorney &c himself is bound, and the client is not. 1 Bow. 128. 2 Ves. 127. "Mast. & Serv." 30.

If a joint tenant agrees to alienate his part, and dies before the agreement is executed; the survivor, it has been held, cannot be compelled to perform it. His claim to the whole being prior to that of the party, claiming under the agreement, to any part. 1 Bow. 129. 2 Ves. 45. 53. - Vid. Newl. 35.

Secus, if the agreement amounts to a severance of the joint estate in equity. The jus accrescendi is, then, destroyed; survivor, trustee for the purchaser. 2 Ves. 634. 1 Inst. 59. b. 1 Bow. 129.
Does not the agreement always amount to a severance in equity, if it is such, as, being made by a tenant in severalty, would be enforced in Chan.? So Newland holds, without qualification, by analogy to the case in Amb. 277. See Newl. 35.
But if so, the first rule cannot operate, in any case. Idea, qu.
- The exception, as first laid down, would seem to require a change of possession under the contract, before the death of the deceased tenant.

(13.) Assent may be either Express, or Tacit. 1 Bow. 131.
Express assent is declared by some sign, intended to signify it. Ex. Speaking, writing, gestures &c - and may be either precedent, concomitant, or subsequent, to the principal act. 1 Bow. 131. Ex. Gr. I. Master sends servant to buy goods on credit. II. He buys, himself, and promises to pay. III. Servant

buys, or master's credit, without previous authority, and his master ratifies it — as, by accepting, and taking to his own use, the thing purchased.

Tacit, or implied, assent may arise, in several ways: Ex. gr. from silence, or inaction. As if a first mortgagee, being present, while mortgagor is contracting with another, to make a second mortgage of the same subject; and, knowing of the contract, is voluntarily silent: In this case, he loses his priority, on the ground of an implied assent, that his own should be postponed. 1 Bon. 132-3. 2 Vern. 187. 1 P. W. 393. 1 Vern. 370. Bon. M. 183. &c. 1 Ves. S. 1 Bro. Ch. 357. See "Mortgages" 58. — Note: The first mortgagee may, in such a case, be postponed on the ground of fraud. ("Mortgages" 58.) But it seems not necessary to consider his silence as fraudulent.

So, if lessee, being present, when lessor makes another lease (14.) of the same land, to a stranger, and knowing the contract, makes no mention of his own lease; the second lessee, being ignorant of the first, will, even at Law, be preferred. 1 Bon. 132. Bon. M. 183-5. 2 Vern. 150. 1 Eq. Ca. abr. 356. 2 Vern. 289.

And Chan.r will enforce such an implied assent even ag.t an infant: Secus he could practise a fraud: Ex. gr. Infant Mortgagee, who, being present, at a contract for a second mortgage of the same property, is voluntary silent.

Assent.

"Mortgage" 58. 3. 90.

And it has been holden that the first mortgagee being a witness to the second deed of mortgage, is sufficient evidence of his knowing the contents, unless he proves the contrary. 1 Bow. 134-5. Bow. Mk. 185 &c. — Denied by Lords Hardwicke and Thurlow (1 Ves. 6. 1 Brow. ch. 357.) — The rule would be dangerous: Opportunity for collusion ag.t first mortgagee.

But to raise such an implied assent, in the person, thus to be affected by it, it is necessary, not only, that he should know that his own claim interferes with the subseq.t contract; but that his silence should be voluntary. If coerced, or awed, into silence, his interest is not affected by it. 1 Bow. 134-5.

(15.)

Upon the same general principles, if the holder of a note, which has been dishonoured, omit to give reasonable notice to the indorser; he is considered as agreeing to discharge the indorser, and to rely upon the maker. Bow. 135-6. 1 T. R. 167. "Law Merchant". Doug. 654. ch. 98-9. 122-4. 202. — Qu: What need is there, of implying such assent, in such a case? The holder loses his claim upon the indorser, by his own neglect.

p. 45.

And in general, the law will raise a tacit agreement, whenever it is necessary for the purpose of giving effect to some principal express contract. Ex. Gr. If one makes a sale of trees growing on his land; he tacitly agrees, that vendee shall have free ingress and egress, to take them. So, one who lets a chamber, tacitly consents that lessee shall have free access to it. 1 Bow. 135. 2 Bl. 35. Finch's Law, 83. Co. L. 56.

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And there is one species of tacit agreement, it is said, annexed to all contracts: viz. That if either of the parties shall fail to perform his part, he will pay the other all damages sustained by the non-performance. 1 Forr. 137. 2 Burr. 1011 3 Bl. 155. F. N. B. 94. Is not this refining too much? What need is there of supposing any such additional tacit agreement? It is never alleged in declaring upon the contract.

When one usually employs another to contract for him on trust, he tacitly assents to any particular contract of the same kind, that the latter makes in his name. 1 Forr. 138. "Master and Servant" 45. (10.)

And in every case of feoffment, release, surrender, gift, &c there is a tacit assent to the act, on the part of the feoffee &c, unless the contrary appears. Presumed to assent to what is, prima facie, advantageous. 1 Forr. 138-9. 2 Leon. 233. 3 Co. 26-7. Stra. 165. 2 Root. 20. 4 Day, 395. - See "Title by Deed" 47. Ex. Mortgage to a creditor, in his absence.

So an heirs acceptance of property descended to him, is presumed. 1 Forr. 139.

So, if drawee of a bill refuses to accept according to the tenor, but pays for the honor of the drawer; the law implies an agreement, by the latter, to repay the amount. 1 Forr. 139. Ch. 103. 122. 163. 185. 209. 3 Burr. 1674. See Bills of Exch.e &c 92.

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So, if a Husb.d turns away his wife; that act, it is held, amounts to a tacit assent, on his part, to be bound by her contracts for necessaries. 1 Forr. 139. "Husb.d & Wife" 21.

17. Upon a sale of personal chattels there is an implied warranty of title by vendor — viz. that the chattels are his; — unless vendee expressly assumes the risk. 1 Forb. 109. 373. Esp. 332. 3 T. R. 57. "Trespass on the Case"

What circumstances invalidate an assent given. —

Ignorance, or error, will, in some cases, invalidate the assent given to a Contract. 1 Forr. 139. 140.

Mistake or error. — If a mistake, or error, of one Party, as to his own rights, is occasioned by the fraud of the other, the contract is not binding, in eq.y (1 Forr. 140). But it is invalid on the ground of fraud. 1 P. W. 239. 4 Vin. 534. 1 Vern. 19. 20. Ex. Gr. Heir induced to believe that his ancestor's will was duly executed, when it was not released his right for a small compensation. Release set aside in Chan.y

"Hom. & Ch." 37. 3. 118. But if on a doubtful point of right, both Parties being ignorant on which side it lies, a contract is made, by which the Party really entitled is a loser; the contract is good: for the Parties agree, upon the ground of the rights being doubtful; and knowing that one of them must be a loser. Thus each voluntarily submits to the risk of losing. Ex. The common case of a compromise between litigant parties.

18. Bro. C. 142-3. 1 P. W. 20. 2 Atk. 587.

But if the Party really entitled, is ignorant of the extent of his right," says Powell— (he must mean of the value or quantity of the subject contracted about; i.e, under a mistake as to a matter of fact.) — and of the means of informing himself, he seems not to be bound in equity, as the case may be: Ex. Gr. Case of a bequest to Daughter, of £10,000, when her orphanage Fort was £40,000: She accepted the former, and released the latter. Release set aside. 1 Vern. 144 S. 3 P. W. 315. 2 Vern. 200. — Qu. Was not fraudulent concealment the ground of this decision?

And in the case of Langdown vs. Langdown, both Parties being received, by the opinion of another, as to the right in question, the Contract was set aside in Chan.y. This was the case of the Schoolmaster. (2 Vern. 196. Mosely 364.— Not like the case of compromising a doubtful right — There both parties agree on the Footing of its being doubtful — Each voluntarily submits to the risk of being the loser. Here both are deceived, tho' no fraud. The deception, however, operated as a fraud, tho' none was intended.

But generally speaking, ignorance of Law, is clearly no ground for avoiding a contract. 1 Evans 3 Conn. R. 347. 2 B & P. 421. 2 East 469. — and quaere as to this case. 5 Taunt. 144. 3 B & C. 282.

"Wagering contracts are, in general, binding upon the Parties at C. L. 11 Co. 87. b. 1 Lev. 33. 5 Burr. 2802. See "Insurance," 17. (And it is not essential to the validity of such a contract, that the event, upon which the wager depends, be, in itself, contingent. Suffic.t that it be equally uncertain to both Parties. In that case ignorance does not invalidate the assent. 1 Vern. 148. Comp. 37. 2 T. R. 63. 3 T. R. 693. 7 J. 33. 37-8.

693. Ex. Bet on the question whether a ship, at sea, is now lost.

(19) There are cases also, in which the assent of an intended purchaser of an estate is invalidated in equity, by erroneous representations respecting the circumstances or qualities of the subject; tho' there be no fraud in the case. The distinction is this: If the mistake respects that circumstance, or quality, which appears to have furnished the principal motive to the purchase; the purchaser is not bound. The ground of his assent fails. Ex. Gr. An agreement to buy land for a mill-seat, and represented as such; and there proves to be no stream. 1 Vern. 147-9. 2 Vern. 196. 2 Vern. 1 Ves. 400. 2 Vern. 185. 1 Vern. 32. — It can not be enforced in Chan^y. 1 Vern. 149.—

Secus, if the mistake relates to a particular, which appears not to have been principally in the contemplation of the purchaser:- He is then bound by his assent, and his relief, it is said, lies in compensation for the difference of value. 1 Vern. 148-9.: and equity will enforce the contract. Ex. A mistake in representing the amount of rent, given for land, which is the subject of the contract. Note. Qu: Will any action, or bill in equity lie for this compensation? I think not: But Equity, in enforcing the contract, may impose terms, which will do justice.

But if, on an agreement for a purchase, the purchaser makes it an express condition, that the subject shall possess certain qualities or incidents; the absence of them will exonerate him. Agreement not enforced ag^t him. 1 Vern. 188. Ex. That a farm has such a proportion of meadow, when it has not. For in such case the contract is not, in its terms, obligatory.

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And in some cases, the intention of the Parties, as to their assent, may be inferred from circumstances; and the want of assent may be inferred in the same way. Ex. Sale of a Female slave in the dress of a man, and sold as a male. Contract void. 1 Pow. 150. There is no assent to the Purchase of the article delivered. Besides, the fraud would vacate the contract, if the state of the fact was known to vendor.

And, according to Powell, if an unsound horse is sold for a price which he could not be worth, unless sound want of assent may be inferred and the contract is void. 1 Pow. 150. Qu: Void? Vide Comb. 8.8. Doug. 23. 1 T.R. 133. 3 T.R. 757. — There is an implied warranty of soundness, according to our decisions* (*Note. Qu. are those decisions now regarded as law? no. 4 Con. R. 248) — 2 Root, 487. 2 Jr. 120. 160 — Contra. Peake R. 115. 123. 1 Selw. 587. 2 East 314. 322. 1 Pow. 142. 3 T.R. 757. — Powell's rule appears decidedly opposed to all Engh. authorities. Caveat emptor is the maxim in such cases; not even damages recovered if no fraud. If vendor was guilty of fraud he would be liable in damages: But even in that case the contract of sale would bind vendee. "The law does not assist fools & buzzards". — as the vulgar hath it; See "Tresp. on the Case" 40. 16. 17. 8 "Assumpt." 22

Of the Subjects of Contracts.

Under this division, we are to enquire, in relation to what subjects, Contracts may be made so as to bind the Parties. 1 Pow. 152.

On this head a distinction is to be observed between contracts executed, and executory. 2 Bl. 443. Executed and Executory what? Pow. 234. 175. Executed &c. 7. 41.

As to the first: No Person can, by contract executed, convey a thing in which he has not an actual or Potential interest, at the time of the conveyt. For one cannot transfer to another, what is not his own. 1 Pow. 152 Pow. 432. Ex. Gr. A grants to B. all (21.)

the wool, he shall hereafter buy. The grant is void. 1 Com. 152. Com. 432. Hob. 132. Co L. 389. b.

So of A lease to B. the land of another; lessee may plead to debt for rent, "the lessor had nothing in the land, at the time of the lease;" nil habuit &c.* (1 Com. 153. Co. L. 41. b. Esp. 233. 306. 3 Lev. 146. *Note. Is not this plea allowed, on the principle that the lessor's covenant (express or implied), of good title, is broken by want of title, and that such covenant is a condition precedent?

Secus, if the lease were by indenture. Lessee is then estopped by his covenant, I conclude. Esp. 233. 306. Gra. 817. 7 J. R. 537.

If one of two joint tenants makes a deed of bargain and sale of the whole land, and his co-tenant afterwards dies, tho' before enrollment; the moiety of the latter does not pass. 1 Com. 160. 2 Bac. Max. 80.* *Note. Qu. If the deed contains a covenant that the grantor is seised of the whole, would not the other moiety pass by way of estoppel?

Upon the same general principle, if A sells to B a horse, with conditions, for payment 6 months hence; A cannot sell him to another before the expiration of the 6 months. For the property is changed: (And the sale to another before the expiration of the 6 months, would not be made good, by B's failing to pay at the time): For at the time of the sale, the interest would not be in A. 1 Com. 164-5. Com. 432.

Of the Subjects of Contracts.

Nor can one grant that, to which he has only an inchoate title, to be perfected in future. Ex. A Contingent Remainder. 1 Bow. 135. Dy. 221. 4 J. R. 248. Tho' such contingent interests are descendible, devisable, and, in Equity, assignable. Fearne. 444 &c. 441. 1 Fonb. 202-3. 209. 3 J. R. 88. 1 Fe. Ab. 30. 1 Bl. R. 222. 605. See "Estate, 3. 22. in Remainder" &c 29.

But a thing, of which one is potentially the owner, — i.e. a thing, accessory to another, actually vested in him, at the time of bargaining — may be disposed of by a contract executed: Ex. The profits of one's land for 3 years to come: So of the future profits of any subject actually vested in the bargainor at the time. 1 Bow. 158-7. Fod. 132. Here, vendor has a present interest (in the subject, in esse, tho' not in esse. (22.)

Rights not vested, actually or potentially, may be the subjects of executory contracts: These being no other than stipulations precedent, and preparatory, to the act, by which the interest is to be conveyed. For tho' one cannot actually convey what he has not, he may oblige himself to convey what he may acquire in future. Ex. A. covenants to purchase Black acre, and convey it to B. — A. authorizes B. to lease the land, of which he shall be seised on such a day. — In these cases, the agreement is good; as a new future act is to be done, to execute the contract. 1 Bow. 158-9. Bac. Max. 79.

Secus, if no future act is to be done, to give effect to the contract. It must then, take effect, if at all, as a contract executed; which

which cannot be, by the preceding rules. Ex. A. covenants to stand seised, to the use of B. of the lands, he shall hereafter purchase. 1 Powr. 159. 160. 234. Bac. Max. 80. 2 Bl. 443. So this operates as a convey.: executed. No future act is necessary.

(23) But a contract executed may bind a future interest by way of estoppel. - It has been holden in Conn.t that if one makes a Deed, with covenant of seisin &c of land, of which he is not the owner, and afterwards purchases it; he is estopped to allege that he had no title at the time of the grant. Vide. 1 Root. 222. 2 Bl. 295. Co. L. 265.

And the rule is the same in England as to leases. Hal. 276. Powr. M. 495-6. 2 Keb. 364. 1 L.d Ray. 729. 5 Mod. 258. 2 L.d Ray. 1046. 1550. Esp. 233. 308. 3 T. R. 370-1.

So of Mortgages. Powr. M. 97. 2 Vern. 11. 1 T. R. 760. See, "Mortgages," 26.

The rule is the same (semb.) at com.n law, as to freeholds, conveyed by deed with the usual covenants. 1 Powr. C. 180. 3 T. R. 370-1. Co. L. 265. Litt. Sec. 446. 2 Bl. 295. See "Title by Deed." 6

Then, may not a contingent remainder or executory devise be
p. 21. passed by such a deed, by way of estoppel? "Estates in Rem.r &c. 29)
the interest being described as a present one.

Requisites of Contracts.

All contracts must be I Possible of performance, II lawful. Possible, or secus.
III. Certain. 1 Forr. 175-6.

I Possible. No right can be acquired, nor any obligation created, by a contract to perform what is naturally impossible. Such a contract is idle, since, in the nature of things, it cannot be performed. 1 Forr. 162. 170. — "Lex non cogit ad vana seu impossibilia." Besides, performance could never have been expected or intended. 1 Roll. 420. (24) Co. L. 206. Ex. Covenant to enfeoff one of lands covered by the ocean. Bro. Ab. Ca. 90. 129. — Promise to go to Rome in three days. To suffer a nonsuit in a pending action, when there is no action pending. 1 Forr. 172. Co. L. 236. Peake, 738.

But the Law distinguishes between acts or things, in themselves impossible, and those which tho' not so, are impracticable as to the party contracting. An agreement to perform the latter is binding: — Of contracts to sell land, or an estate, which belongs to B. Here A. is liable in damages for non performance, tho' Ch. will not decree a specific execution. 1 Forr. 161-2. 2 Ch. Rep. 15 or. 105.

In the former case it must be evident to all parties at the time, that performance is unattainable. It could not, therefore, have been the intention of either, that it should be performed. Secus. in the latter.

On an agreement to deliver two grains of corn on Monday, and so on in progression, doubling the quantity on every succeeding Monday in the year. The promisor it is holden is liable to pay "something." So of an agreement to pay for a horse, a barley corn for first nail &c. Holden liable to pay the price of the horse.

Posible &c. Contracts. Requisites of.

1 Tom. 182. 2 L^d Ray. 1167. 8 Mod. 305. 1 Vent. 259. 1 Lev. 111. 1 Wils. 205. 1 Peb. 709.

(25.F.) Upon what principle is this decision founded? 1st on the general rule is that if the thing stipulated for, is not delivered its value is the measure of damages. 2 Burr. 1010. Yelv. 48. 2 East 211. 1 Fonb. 424. 1 Fon. 408. Ay. 81.b. 82.b. 1 Vern. 217. Eq. Ca. abr. 221. 2dly not the entire contract treated as void, on the ground of fraud; and the promisor subjected upon an implied contract to pay the value of what he has received upon it.

p. 24. A Contract is not void on the ground that its performance is impossible, unless it is strictly so. The distinction between a near, and a remote, possibility of performance is not regarded in Executory contracts. Ex. A covenant by A. that, if he dies without issue, his land shall be settled on B. is binding; and may be specifically enforced in Chan^y. 1 Ves. 153-4. For the contingency, whether probable, or not, is not impossible.

A Had if one covenants expressly, and absolutely, to do a thing, not impossible in itself, his being prevented from performing it, even by inevitable accident, does not discharge him. Ex. Covenant to be at such a Port, at such a time, with a ship to take a cargo — Prevented by tempest &c. — Covenant holden liable.* 3 Burr. 1603. 1 Fonbl. 368. Doug. 284. See action of Covenant broken.

* Note. It would be otherwise, I trust, if the covenant had been to perform the voyage within a time, within which such a voyage could not possibly be performed, in any case. (Note 24.)

In such a case, he is virtually an insurer ag^t the risk of failure.

(13) Requisites of. Contracts. Lawful, or Legal.

II? Contracts must be Lawful. The thing stipulated to be done, must be morally possible, (i.e.) lawful; or the Contract is void. For no one can be bound in law to do an act which the Law, itself, prohibits. 1 Bow. 184-5.

A Contract is ag.t law, when the agreement is to do something (20.) which is malum in se, or malum Prohibitum. 1 Bow. 185. 1 F. W. 189.

Of the first kind, are all contracts, which have, 3.35.47. for their object, something, forbidden by the Laws of Nature; as to commit murder, theft, &c. 1 Bow. 186-5.

A contract, therefore, to pay A. B. a certain sum, if he will kill, or rob, C. D. is void. 1 Bow. 186. 1 Kank. 103. 1 Hawk. 213. Comb. 39. — To hold it valid, would be to furnish a motive for the commission of a crime.

Secondly:— Contracts are ag.t Law, when they have, for their object, something, which, (tho' not ag.t the Laws of Nature, or the divine laws), is contrary to the law of the land, or the Municipal Law. Co. L. 206. 1 Bow. 186. Ex. A promise to pay for smuggling goods

And a contract may be contrary to the law of the land, as being, I.st Repugnant to the Public welfare: II.d As being ag.t some maxim or principle of law. III.d As being opposed to some positive statute. 1 Bow. 186. Comb. 39. 1 Ves. Jr. 322-327. 3 T. R. 17-22-3. 7 T. R. 543. 8 T. R. 69. 1 Bos & Pul. 272. 2 Wilson, 341.

Lawful &c.

(27.)

Contracts.

I. Hence, all contracts, the object of which is a general restriction upon ones trading in a particular way, are ag.t law, as being opposed to the welfare of the State, and therefore, void. 1 Com. 166-7. All. 67. Dr. 143. Hob. 211. Ray. 292. Bro. El. 872. 1 Jid. 303.

So are all contracts, in general, which militate ag.t national policy. 1 H. Bl. 322-37. 7 T.R. 543. 8 T.R. 89. Comb. 39.

Rule the same, as to contracts, the object of which, is a general restriction upon the exercise of a trade, even for a limited Period. 1 Com. 167. 7 T.R. 543. Ms. 115. Bro. Jac. 396. Co. L. 206. 1 Ld. R. 181. 6

So, if a Husbandman agrees not to cultivate his land. 1 Com. 167. 1 Leo. 53 b.

But an agreement not to exercise a trade in a particular place, may be binding. Ho such contracts may be useful. 1 Com. 167-8. Bro. Jac. 396. 2 Bulstr. 186. Palm. 172. 1 Jones. 13.

But a contract of the latter sort is not obligatory, unless founded upon sufficient consideration. And upon this point the onus probandi, it seems, lies upon the party claiming under the contract. The presumption, is ag.t the existence of a sufficient consideration. Hence, such contracts, tho' they may be valid, are not prima facie, so. 1 Com. 168. Gra. 739. All. 67. Ms. 115. 242. Palm. 172. 1 Ld. R. 181. 192. 10 Mod. 27. 85. 130. This presumption arises from the jealousy, with which the law regards such contracts. (even tho' the cont.t be under seal.)

And it seems to be immaterial, whether the trade, which one agrees not to pursue, is his trade by profession, or not. If it is not, still the validity of the contract depends upon the foregoing distinction. For no man ought to be permitted to preclude himself from engaging in any useful trade. 1 Forr. 169. 1 T. R. 142. - And therefore the Policy of the law is opposed to the contract.

Upon the same general Principle, a bond, or agreement for unlawful maintenance is void. It is ag.t the Public welfare. 1 Forr. 172. Carter. 229. 2 Inst. 212. 4 Bl. 135. - By maintenance is meant the upholding of another's law suits.

Alien = Enemy.

A contract with an alien enemy, is also regularly void: as being ag.t the Public welfare; because communication with a Public enemy may endanger the Public safety. 1 Forr. 173. 2 Bol. 173. 1 T. R. 88. 8 T. R. 548.

(29)

Upon the same Principle, it seems now settled, that an insurance upon the property of an alien enemy, is void. It promotes the commerce of the enemy, and gives our own citizens an interest in the security of that commerce. 8 T. R. 548. 1 Bos. & Pul. 345. 1 East, 95. 475. Doug. 238. 6 T. R. 35. - Lords Kenyon & Mansfield both opposed to this rule.

Lawful &c.

Contracts.

The rule, however, that contracts with an alien enemy are void, is not universal. Ransom Contracts with an enemy are obligatory; (i.e) a contract, by which the captured party, or condition of being discharged, agrees to pay to the captor a certain sum as a ransom*. And the master of a ship may, by such contract, bind his owners as well as himself. This is a rule of the law of nations. Doug. 619. 3 Burr. 1734. 1 Bl. R. 563. - But the action will not lie, till peace is restored. 6 T. R. 23. Marsh Ins. 37. - *Note. But such contracts can be enforced only in a court of admiralty. Marsh. Ins. 432. 600. See "Pleadings" 30. Insurance. 3-4. 9 S.

Rule the Same, tho' the hostage dies; or, tho' the captor is afterwards taken with the hostage. The latter being only a pledge, the duty exists, independantly of the hostage. Doug. 619. 1 Bl. R. 563. 3 Burr. 1734.

And, as I conceive, such contracts, in general, made with an alien enemy, as arise out of a state of hostility, and tend to mitigate the evils of war, are binding. Doug. 625-6. - Ex. gr. Treaties of peace between belligerent states. Truces, Capitulations, &c between military commanders - Agreements for exchange of Prisoners &c.

(30.) In Eng.d however, ransom contracts are now prohibited by Stat. 22 Geo. III. (Marsh. Ins. 432.) Qu. as to the U. States.

Contracts.

Lawful &c.

Marriage-brocage bonds are void; i.e. bonds given for assistance in promoting marriages; Because they are of dangerous consequence, as militating agt. the welfare of society. 1 Pow. 174-190. 1 Ch. R. 87. Show. P. C. 76. 1 Vent. 245. 1 Burn. 474-5. Esp. 184. 3 Lev. 411.

"Pow. 2 of Ch. 40."

The same principles apply to promises and agreements of the same kind. 1 Pow. 174.

II. Contracts opposed to any maxim or principle of law are void. Pow. 155. - Hence, if the consideration, which is the cause of a promise, or the promise itself, is opposed to any such maxim, or principle, the contract is unlawful and void. 1 Pow. 176. 1 Salstr. 38. 3 Salk. 97.

Thus a promise, in consideration, that promisee would, fraudulently, discharge a debt, due to his master, was holden void. 1 Pow. 176. 3 Salk. 97. The consideration is opposed to principles of law. Ergo. the whole contract void.

P. 34.

If a Sheriff promise, for valuable consideration, to permit an escape; it is void; (as is an obligation or promise to indemnify him for it — in which last case, the consideration is opposed to the principles of law) 1 Pow. 175. 10 Co. 76. 102. Dy. 350. Bro. Ex. 199. See title Sheriffs H. - Here the promise is opposed to i.e. the thing promised.

(31.)

P. 35.

Unlawful.

Contracts.

So, a promise, by a Minister of Justice, to do an unlawful act, in his office; for the thing promised is unlawful. Or, by another, to indemnify him for doing it: 1 Forr. 170. Cro. El. 230. For the consideration is illegal.

But when the unlawfulness of the consideration, or rather, of the fact, which makes it unlawful, is unknown to the promisee, a Contract of indemnity, founded upon it, may be binding. Ex. A. brings B. to an inn, under pretence of having lawfully arrested him, and promises to indemnify the host, for keeping him, as a prisoner. If the host is subjected, A. is liable on his promise. 1 Forr. 177-8. Hatt. 53. ("Action on the Case." 17). For the host is innocent of any crime: His motive being innocent. Hence no illegality in the consideration can be imputed to him.

See "Title by Ex." 10" So, if a plff in a fieri facias, requests the Sheriff to take certain goods, as the defendants, which are not his, and promises to indemnify him; the promise is good. 1 Forr. 178. Cro. Jac. 75-2. (See "Trespass on Case." 17.) Reason as last above.

(32.) Introduced into Page 40.

(33.) All contracts, the objects of which militate agt the laws of
p. 15. 19. 35. Morality and decency, are void, as being illegal. Ex. The wa-
37. 38. ger as to the Sex of Chevalier D'Eon. Comp. 39. 729. 735.
Wagers. 1 Forr. 183. 233. 2 T. R. 80. 3 T. R. 693.

Contracts. Unlawful.

So, of contracts made for corrupt purpose. Ex. Bet with one having a vote, or influence in appointments, that I shall not be appointed to such an office. Marsh. Ins. 95. 1 Bow. 182. Com. 39. 2 T.R. 510.

So, of a wager with a Judge, or Counsel, by way of a bribe. 1 Bow. 184. 17. R. 50. Assumpsit, 25-5. J. 40.

So, of a wager that is but a colour for Usury. 1 Bow. 184. Ex. Loan, on a bet by Lender, that the borrower will not repay it, in such a time.
So, of a wager as to the mode of playing an illegal game 2 H. Bl. 43. It promotes a knowledge of the game.

But a wager between Plff and Defendant in a cause, as to the ultimate decision of it, is good at com. law. 1 Bow. 184. Comp. 37. For this does not create their interest in the ~~cause~~ issue of the cause; nor does it tend to influence the decision.

And wagers in general are binding at Com. law. 1 Bow. 140. ante. 18. But the rule has been much disapproved of. Marsh. Ins. 95. 2 T.R. 510. 3 T. R. 693. — But in Cont. all wagers are made illegal by Stat. (Stat. c. 30?) So, of money knowingly lent, at the time and place of gaming &c to a party gaming &c H. Post. 37. — — Does the Stat. extend to any case of money lent to a party wagering, except that of a wager upon some "game, horse racing, or other sport a pastime"? semb. not.

(34.)

Contracts.

Contracts in fraud of third persons are illegal and void. "Pow. of Att. 40." — Ex. Agreement between two suttlers and another to cheat the government, is the purchase of supplies for the army. 1 Pow. 185. Esp. 184. Doug. 450 or 433. 2 Pow. 166. 170. Salk. 150. 4 T. R. 166. 1 H. Bl. 325. 650. 3 T. R. 763. 1 Bos & Pull. 95. 286. Void at law as well as in Equity.

So, of a secret agreement, by one of the parties to a marriage, to refund part of his marriage portion. It is fraudulent as to the other party to the marriage. Esp. 184. Stra. 240.

So, of agreements to pay for attendance at auctions, to enhance the price of goods, by influencing bidders. 1 Pow. 186.

p. 36. 47. Page 35. Contracts are unlawful and void, where the object of them is the omission of some legal duty. 1 Pow. 195. Ex. a Covenant, by an under Sheriff, not to serve executions above a certain amount; or not to execute Process in a certain part of the bailiwick. 1 Pow. 195-6. Hob. 12. Moor. 850. — See "Sheriffs &

p. 20. So of contracts which tend to encourage unlawful acts or omissions, of any kind. Ex. a bond to indemnify a printer ag.t any indictment or action for libels. 1 Pow. 196. — An obligation given for compounding a felony, is illegal. 2 Esp. 725. Qu.re, if the crime is only a misdemeanor. 2 Esp. 643. 7 T. R. 475. 2 un. 2 Wils. 341. Contra.

So of a contract to indemnify a Sheriff for embezzeling a Writ, or permitting an escape. 1 Porr. 197-8. Flowd. 80. 84. 2 Bulstr. 213. p. 31.

Or, to save one harmless, if he will commit a felony, trespass, or other wrong. 1 Porr. 197. 1 Lev. 209. 10 Co. 100. b. Dy. 118-19. 324. Cro. C. 353-4. See "Sheriffs &c." It is a temptation to the commission of an unlawful act. page 30.

So, of a wager between two, that one of them, or a third person, shall do any criminal act. 1 Porr. 198-9. It is an incitement to immorality. page 30. p. 33. p. 48.

III. Contracts prohibited by Stat. Law are void. 1 Porr. 186. 186. 1 T. R. 499. Marsh. Ins. 96. 2d Ed. A contract for more than legal interest is void by Stat. 12 Anne, and our own Statute. 1 Porr. 188. 1 T. R. 735. "Statute of Usury" page 34 continued.

So, of a secret agreement by a bankrupt, or by any person in his behalf, to pay money to a creditor, for signing his certificate, is void by Stat. 5th Geo. 2nd. 1 Porr. 189. Doug 690 or 670. n.); and would have been so at C. L. (semb.) as fraudulent on the other creditors. 1 Porr. 190-1. Doug ub. sup. — The money ought to go to the payment of all the creditors, or to any of them. p. 38

So holden in Conn. in case of a compromise between an insolvent and his creditors — Upon a bill in Equity by the debtor, to be relieved ag.t such a contract. 1 S. Ch. L. & Ch. Ramsay v. Blake

Unlawful. Contracts.

(35.) Distinction between cases of covenants, or bonds for the performance

Title by Deed of covenants &c, where some of them only are lawful, and some made

60." "Assump- void, by statute; and cases where some are lawful, and some are

sit, 32" void, at Common Law. In the former case, the whole bond, or other instrument, is void; in the latter, it is good as to the covenants that

7.0. are in themselves lawful, and void as to those that are unlawful.

8.35. 1 Pow. 199. 2 Wils. 351. 1 Vent. 237. – Thus, if an under Sheriff covenants not to serve executions above a certain amount and also to save the Sheriff harmless of all escapes of Prisoners arrested by himself; the contract as to the former covenant is void and as to the latter, good. The illegality of the former covenant is created by the C. L. 1 Pow. 199–200. 2 Wils. 351. 4 Maule & Sel. 66. – But a bond, given, to secure two distinct debts, one legal, and the other usurious, is void, in toto. 1 H. B. 462 – But if a Sheriff takes a penal bond

7.28. agt. the Stat. 23. Hen. 6. (for ease and favour), and also for a legal debt due; the whole bond is void. – 1 Pow. 200. 4 Bac. 438–9. 1 Vent. 237. 2 Wils. 351. See "Sheriffs &c." 30

This distinction, arises, I conceive, not from any difference in Princi=ple, between the effect of a partial illegality created by stat. in one instance, and by the C. L. in the other; but from the phraseology and structure of Stat. law; which, in such cases, declares the bond or security, void; i.e. (according to the construction given to the words), the whole bond or security. – If a Stat. should merely declare a particular clause, or condition, in any obligation to be void; the whole obligation would not be so, I trust.

But tho' an illegal contract creates no right that can be en=forced; yet after it has been executed, the law, in some instances suffers it to prevail, by refusing to aid either Party in rescinding it. 1 Pow. 200.

II. Where the illegality is of such a kind, that both Parties are deemed criminal: Here, if the contract is executed, by Performance of the illegal act; he, who has Paid, cannot recover back, what he has paid. In Pari delicto, Potior &c. 1 Bm. 200-1. Doug. 451. or 408. Bull. 131-2. Sal. 22. 8 J. R. 575. 1 Bos. & P. 298. Comp. 790. 2 Burr. 1012. ___ Secus, while the contract remains executory, as to the act stipulated for; i.e. while the criminal act remains unperformed. There, the other Party may recover back the money he has Paid. 1 Bm. 202. 2 Bos. 7. Bull. 132. Doug. 471. cited. Ex. money Paid to A. to hire him to beat B. — If the battery is not committed, the money may be recovered back: Secus, if it is committed. *Note. Qu. as to the correctness of the distinction, in Point of Principle? Would it not be better to allow a recovery in both cases, or in neither? 7 J. R. 535. Post, 47. (37) 7. 38. 47. "Assumpsit, 13-4"

Hence, decided, that money, deposited on an illegal wager and Paid over, with losers consent, after the wager is decided, is not recoverable back. 8 J. R. 575. 1 Bos & Pull. 3. 298. Doug. 690. n. vid. 1 Root, 91. — Secus, before the wager is decided. Marsh. Ins. 552. Doug. 451. Qed. dub. Marsh. Ins. 553. 7. 18. 19. 33. "Insurance, 130."

But if money, thus deposited, has not been Paid over; either Party, it has been holden, may recover from the Stake holder, the Part, deposited by himself; tho' the wager is decided. Ex. On a boxing match. For the loss is not Paid, and winner has no legal claim to recover it; tho' the illegal act is committed: For the law will not aid in enforcing the contract; as it would not in rescinding it, if the money had been Paid over. 5 J. R. 405. 3 East, 222. Qee. 4 Johns. 426, contra. As to wagers. See Assumpsit, 14-5.

Unlawful

Contracts.

Suppose Stake-holder pays the whole to winner, after being prohibited; is he, (the stake-holder), then liable? (Note. Q? is not the point the same in principle, as the last?) 1 L? Ray. 89. 5 T. R. 409. 1 Bos. & P. 297. 1 Bl. Bl. 64. 2 Bl. R. 1075. 2 Wils. 309. — Semble on principle, he is: for, as it seems to me, the winner could not, in such case, recover it, of stake holder; and that the latter could not retain it, ag^t the loser. 3 East, 222. Park, 8. Marsh. Ins. 43. — See vide Esp. Dig. 25 contra, by Hoffman, Recorder. And the weight of authority seems to be ag^t the right of recovery, on the ground, that where the contract is executed, the party paying cannot recover back.

Under our Stat. the loser may recover back in all cases, Stat. Con^t 3 Cr. ante, 33.

(38.) — And it has been once decided, that money, paid to one of the parties, before hand, on an illegal wager, was recoverable back, after the event, 7 T. R. 558; and tho' the event was in favour of the defendant, (the winner) *(Note. In 8. T. R. 575, it is said that the action was ag^t the stake holder, before payment over. Esp. 55.)). Questioned — 1 East, 98. See. 8 T. R. 575. See 4 Johns. 420. — Indeed the case is opposed to the current of authority

p. 37. Money, advanced for the procurement of an office, is recoverable back before the office is procured; but not afterwards. — So, of a premium, paid on an illegal policy, — before, and after, the risk is run. 1 Pow. 202. 206-7. Doug. 471. cited. But this distinction, as before remarked, appears to me, opposed to the policy of the law.

Unlawful &c

III. But where the party, who has paid money on an illegal contract, is not particeps criminis, he may recover it back, tho' the contract is executed, on the other side. 1 Bos. 201-2. See Assumpsit. 13.

This is the case, where the law prohibits the contract, for the protection of the party paying. Ex. the case of usury paid, 3.47. 1 Bos. 202. 204-5. Cowp. 791. Doug. 451. 671. n. Stra. 915. 4 T.R. 566. Bull. 132. 1 H. Bl. 65. 1 Bos. 218. 235. — Salk. 22. contra. Reason: The object of the stat. would, otherwise, be defeated. So, of money paid by a bankrupt, or his friend, to a creditor, for signing his certificate. 1 Bos. 205. 3.34.

A security given, or promise made, in consequence of a previous transaction, prohibited by positive law, is not, however, of course void. Ex. If one of two partners in an illegal transaction, pays the whole losses, and takes a security or promise from the other, for repayment of his part; it is good. For the contract is one step removed from the illegal transaction: That is past. The payment of the losses, is not unlawful; and the promise of repayment, neither is unlawful, nor tends to anything that is so. And the payment, as to half, is virtually a loan. 4 Burr. 2069. 3 T.R. 418. 2 H. Bl. 379. Wats. 180. Sed. Qu. 3 T.R. 422. 5 T.R. 67. 405. 2 Bos. & Pull. 372-3. 7 T.R. 30. — (39.) 3.48.

So, it has been holden, if it is paid with the privity and consent of the other party, tho' no security is given, or promise made 3 T.R. 418. — Qu. This rule has been much shaken, and seems virtually overruled. It appears, on principle, not to be law. There was no obligation on either party to pay the loss. See 2 H. Bl. 379.

Unlawful

Contracts.

6 T.R. 61. 405. 7 T.R. 630. 2 Bos. 372-3. 3 Ves. Jun^r.

If paid without his privity, or consent, there can, clearly, be no recovery had. 2 H. Bl. 379. Here there is no new res gesta; no special instance, from which to imply a promise.

If deposited with a third person, to be paid over; the party, for whom it was deposited, cannot recover it from the depositary. Marsh. Ins. 443. 3 East. 222. Park. 8. Assumpsit, 14.

If a person makes a contract, the making of which is itself, made criminal, in him, by positive law; he may be bound by it; (semb.), tho' he could not claim under it. Ex. Eq. stat. 21 Hen. 8. it is an offence for a clergyman to trade; but if he should trade, he would be bound by his contracts, as a trader. 1 Atk. 195. 199. Ch. 19. For the nature of the contract is not unlawful; his making it, only, is so. He only is the offending party. And the object of the law is merely to subject him to a restraint; not to grant him an immunity. He cannot take advantage of his own offence, or of the law, which he has violated.

(40.) So, if one trades in smuggling only; he is liable as a trader to the Bankrupt Laws. 1 Atk. 199.

Contracts.

Certain.

If the object of a contract is perfectly useless, it is void. Cui bono? No valuable end to be attained — of no advantage to the party claiming. Ex. Agreement not to wash one's hands. (Note. Courts not this be ag^{t} decency, and, of course, ag^{t} morality — and void on that ground?) 1 Bow. 231. 2. — not to smile — not to follow a fashion in dress &c. "Lex non cogit ad vana &c.

A contract which wantonly affects the interest, or peace, of a third person, is void. Ex. Wager that A. has committed a crime; or as to the sex of a third person, or any personal bodily defect. 1 Bow. 232-3. Comp. 729. 735. 3 T. R. 693. J. 33.

So, of a wager that tends to the introduction of indecent evidence. 1 Bow. 233. 3 T. R. 700.

IIIIdly. Certain. 1 Bow. 180-182. 1 Gil. 270. 1 Keb. 770. Hob. 89.

Hence, if A. promises to deliver goods, in consideration of B's promise to pay money in a short time; B's promise is said to be void. 1 Bow. 180. 1 Bulstr. 92. 97. Cro. Jac. 255. Because B's promise, which is the consideration of it, is uncertain, and therefore, void. from page 32.

But a promise to pay money, without appointing any time of payment, is good. It is payable immediately. 1 Bow. 180. For it creates a present debt. 7 T. R. 124. 427.; and no future time is appointed for payment. from page 32.

Certain. Contracts.

Tho' if one promise to do a collateral act, and no time is appointed; he has his whole life time, it is said, to perform it in. Ex. To make a lease. To deliver goods &c. 1 Bow. 180. 2d. Would it not, now be construed, as requiring performance, in a reasonable time — or, on request.[2]

But id certum est, quod certum reddi potest. Hence if I promise to repay to A whatever he pays out for me; it is sufficiently certain. 1 Bow. 180. Pothl. 148. Bro. Chat. 194. 1 Jid. 270. 1 Ves. 56. 65. For what he advances for me, may be ascertained.

(41.) Of the Nature and Kinds of Contracts.

All contracts are executed, or executory. 1 Bow. 234. 2 Bl. 443.

A Contract is said to be executed, when the parties transfer property to each other, together with immediate poss.[n]; or with a present indefeasable right of future poss.[n] Ex. I. Goods sold, paid for, and delivered. Exchange of horses. II. One having land under lease, sells it, to vest in poss.[n] when the lease determines, and receives the price. 1 Bow. 234. 175. 188-9. 2 Bl. 443. — Here the whole agreement is executed, on both sides.

Executory are those, by which no property passes, in presenti, but which are introductory or preparatory to an actual future transfer, or exchange of property. Ex. An agreement to exchange horses next week — An agreement to grant, sell, pay &c. in future. 2 Bl. 443. 1 Bow. 235.

Contracts.

Kinds of

A contract, then, is executory, when one performs immediately, and the other is trusted; and when neither performs, but each is trusted.* Ex. I. Loan of money, and a promise of repayment; II. An agreement to make a lease, in consideration of an agreement to pay for it. 1 Pow. 234. (*Note. Would it not be more correct, to say, that it is executory in the former case on one side, and in the latter, on both?

All contracts are, according to Powell, express, constructive or implied. 1 Pow. 235. — The usual distribution is into express, and implied; and this, I think, is the correct one.

II. An express contract is one, in which the parties stipulate, (42.) in express terms, what is to be done, or omitted. 1 Pow. 230.

III. Constructive contracts, are such, as are raised, by construction, out of instruments, or express agreements; and are different from what the instrument, or express agreement, prima facie, imports; i.e. they vary from the form and terms of the instrument, or express agreement, from which they are raised. 1 Pow. 235. Cro. Jac. 137. 6 & 8. Cro. 131 2. 1 Lev. 24. Hay. 14. Skin. 113. — This, however, is but a division or branch of express contracts; being raised, by construction from the words used. — Thus a recital in a deed of convey.ce respecting the Grantor's estate in the subject, amounts, in construction of law, to a covenant, or agreement, that he has title according to the recital. Ex. "Whereas A. B. is possessed of Black acre for years" &c. he assigns &c. 1 Pow. 237. 1 Leon. 122.

So, a recital in a marriage settlement agreement, that "Whereas A. is to pay B. 1000 £. for the marriage portion" &c. was holden to be a covenant for the payment of that sum. 1 Pow. 238. 2 Freem. 87 2 Eq. Ca. Ab. 1.

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So, an exception, in a deed indented, may amount to a covenant. Ex. Lease, by indenture, of a farm excepting a particular close: This is said to be a covenant by lessee, that the close shall not pass by the demise. 1 Bow. 238. 4 Co. El. 857. Plowd. 67. 1 Leon. 117. 1 Rol. R. 102. 11 Co. 55. b. "Covenant broken" ____ What need is there of calling it a covenant? If not a covenant, the part excepted would not pass. It seems to be only matter of description.

(43.) But it is now holden not to amount to a covenant that lessee shall not disturb lessor's "pass" of it. Same authorities — For lessee is a stranger to the part excepted

But where the exception is of something arising out of the thing demised, it amounts to a covenant that lessee shall not disturb lessor. * ut supra. (* Note. Qu. Unless it be by indenture. 1 Bow. C. 238. C. But qu. also, Whether an indenture is necessary. Leon. 324. 1 Bow. 241-2.) — Ex. Lease of land, excepting a right of way over it — Lease of a house, excepting a right to pass through, &c. 1 Bow. 241. 1 Leon. 324. 1 Bac. Ab. 531. Carthew 232. Salk. 190. 11 Mod. 170. — For here lessee has an interest in the subject, out of which, the right excepted, arises, and, therefore, is considered as a passing the right.

So, a reservation of rent, in a lease indented, amounts to a covenant to pay it on the part of the lessee. 1 Bow. 242. Cro. E. 857. Dy. 57. Jma. 407. 1 Vent. 12. Cro. Jac. 399. Esh. 105. 1 Rol. 518. Ex. "Yielding and paying" &c.

So a lease without impeachment of waste, gives lessee the trees growing upon the land demised. 1 Bow. 243. Hob. 132.

Kinds of — Implied.

So, if an obligation is indorsed, that obligee wills, that the obligation, in a certain event, shall be void; it is a good condition, tho' the words are the obligee's, and not the obligor's; for such appears to be the intention of the parties. 1 Bow. 244. 1 Leon. 248.

IIII. Implicative, or implied, contracts, are those, which are neither expressed in terms, nor raised, by construction, from the terms used in an express contract; but which arise by operation of law, out of the nature of the case. Ex. Labour done, & goods sold, without any express promise of payment. A contract to pay, is implied. 1 Bow. 246. See "Assumpsit." (44.)

So, if one takes, without authority, the profits of an infant's land, there is an implied promise to account for them. 1 Bow. 245-6. "Parent, & Child" 145-6.

So, if one delivers his goods into the custody of another; the latter impliedly engages to take such care of them, as the law requires. 1 Bow. 246. "Bailment."

So, if a Sheriff levies money on execution, the law raises a promise that he will pay the money to the Plff in the execution. 1 Bow. 255-6. — And the numerous class of actions, called indebitatus assumpsit, is founded upon promises implied by law.

If A. grants his trees to B. he impliedly grants also a right to come on the land, to cut and remove them. And if he grants to B. land, surrounded by his own, he impliedly grants a right of way to it. 1 Bow. 256-7. Hard. 15. 1 Saund. 322. 3 Finch's Law. B. 2 Bl. 36. For otherwise, the grants cannot be enjoyed.

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Implied. "Estates", 45. If lessee holds over, without opposition from lessor, the former is, by implication of law, considered as tenant from year to year. 1 Bow. 135. 258. – There is a tacit agreement to renew the lease in this manner. –

In Equity also, contracts are sometimes implied: Ex. If Purchaser of land, having paid only part of the Purchase money, becomes bankrupt; the land stands charged with the residue. Purchaser is, by an implied agreement, a trustee to that amount. 1 Bow. 257-8. 2 Bro. Ch. 423-4. 3 Atk. 272. – Qu. If security is taken for the Purchase money? 1 Bro. Ch. 420.

Absolute. Conditional. Contracts are either absolute, or conditional. 1 Bow. 256. 259.

An absolute contract is one, by which a Person binds himself, or his property, absolutely, and unconditionally. Ex. A in consideration of a lease, Covenants, or Promises, to pay rent; or in consideration of money paid, promises to deliver a house, or to build a House. 1 Bow. 259.

(46.) Conditional. A conditional contract is one, the obligation of which depends altogether, or in some respect, upon some uncertain event, upon which it is to take effect, or to be defeated, enlarged, or abridged. 1 Bow. 259. 2 Bl. 152. Co. L. 201.

Thus, if A. agrees to purchase land, on condition that B. returns from India, by such a day, the condition suspends the obligation to perform till the day; and if B. does not then re-

turn, the obligation to purchase is annulled. 1 Bow. 259. 2 Bl. 154. Show. P. C. 83.

So, of a promise to pay A. 100 £. on condition, that he marries B. by such a day; or, that he convey land by such a time. The same authorities and 1 Bow. 260. Co. L. 201.

If A. sells property to B. on condition, that in a certain event, B. shall pay for it 10 £. and in another event but 5 £; the contract is conditional, quoad the amount to be paid. 1 Bow. 260. Park. sec. 712.

If A. agrees to give B. for his land, as much as C. shall adjudge it to be worth; A's obligation to pay, is suspended, till C. decides the value. Then he is absolutely bound to pay. 1 Bow. 261. Dy. 91. b.

(47.)

As to unlawful conditions: The effect of these varies according to the nature of the contract, and of the condition. 1 Bow. 261. Unlawful Conditions.

If an unlawful condition is annexed to an executory contract, the contract is void — Thus, if one be bound in an obligation conditioned for the performance of an unlawful act, by either party; as to kill J. S. — to steal &c; the bond is void. 1 Bow. 261. Co. L. 206. b. Esp. 175. 182. 185. — In this case performance cannot be compelled, because a right of recovery cannot be acquired by the commission of a crime. N. B. p. 25. 35.

So, if the condition is for the performance of any unlawful act, or for the omission of any legal duty. Esp. 175. 185. 2 Vent. 109. 2 Wms. 344. 3 Lev. 411. — a whole void p. 35.

So, if the condition militates ag.t public policy, or the general welfare. Ex. In restraint of trade &c. Esp. 183. 1 P. W. 181. 4 Burr. 2225. p. 207

Unlawful conditions.

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In such cases the law frees the obligor from the penalty, lest he (in one class of cases(1*)), should be under a temptation to commit the crime; 1 Bow. 162: ((1*) Note. i.e. cases, in which the unlawful act is to be done by him.)): And deprives the obligee of any benefit of it, to guard him, (in another class(2*)) agt. a similar temptation. ((2*) Note. - cases in which he is to do the act) -

7.37.54. N.B. But, generally, if an unlawful condition is annexed to a conveyance or contract, executed; the condition only is void; the conveyance is good. Here the aid of the law is not necessary to enforce the contract of convey.e; it being executed by the parties.
Thus, if one makes a feoffment, a grant, with condition, that feoffee shall do an unlawful act, the condition only is void; the feoffment is good. and the estate is absolute. 1 Bow. 201-2. 2 Rol. 157. Co. L. 206. b. — Here, that feoffee may be under no temptation, (ut supra) the law secures to him the estate, without performing the condition. 1 Bow. 262.

(48.) But tho' the effect of the condition in these different cases, is different, the principle is the same in both. In the former class of cases, i.e. where the contract is executory, and the condition unlawful; the law will not enforce it. In the latter, i.e. where, the contract is executed, and both parties are criminal, the law will not aid the feoffor to defeat it. So that, in both cases, the law leaves the parties, as it finds them.

But this latter rule holds only where the parties are in pari delicto, or both criminal. It is otherwise, when the feoffor is not particeps criminis; as if a mortgage is made to secure usury. (ante 38.) In such cases the convey.e is void; and thus the innocent party is protected

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So, bonds in restraint of marriage, are void: Esp. 183-4. 4 Burr. 2225: the condition being unlawful.

So, of bonds for withholding evidence. Esp. 184. 2 Vent. 109. 2 Wils. 344.

So, of bonds to secure a reward for prostitution; if given beforehand; though if given afterwards they are valid. Esp. 182. 3 Burr. 1568. 1 Bl. R. 517. 3 Wils. 339. 2 P. W. 432. — In the former case, they are an inducement to immorality; in the latter, not.

p. 39. Fraud. Conveyances. 31.

All conditions, repugnant to the nature of the contract, are void. Ex. feoffment in fee, on condition that feoffee shall not alienе; or shall not take the profits. The condition is ag.t law, and the estate is absolute. 1 Bow. 2 D. Co. Inc. 695. 2 Vern. 233.

Repugnant

But a bond, or covenant, by feoffee, that he will not alienе, or will not take the profits, is good; — for this does not disable him to alienе, but merely subjects him or his bond if he does. (Same authorities.) Ex. Bond, that feoffor shall have the profits: It makes feoffee, a trustee to feoffor.

(49)

Of Impossible Conditions.

Conditions may be possible, or impossible. — Possible conditions require no explanation. See 1 Bow. 203-4.

Impossible Conditions.

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Impossible conditions are I. Such as are so, at the time of the contract's being made; or II Such as become so afterwards. 1 Forr. 204.

p. 23. p. 142. II. If a condition, possible at the time of making it, but afterwards becoming impossible, by the act of God, or of the law, is annexed to a contract executed, the contract is not avoided by non performance. So. L. 288. 4. 1 Forr. 204. 5. 444. 446. Same rule, if the condition becomes impossible by the act of the party granting the interest. Same authorities. (* Note. Secus, if it becomes impossible by the act of the party, to whom the grant is made. In this case, the grant is defeated, or becomes void. 1 Forr. 420. Co. L. 210. b. Post, 138.)— Ex. Feoffment, grant &c, conditioned that feoffee shall, within 6 months, go to London, on feoffor's business; feoffee dies within the time; the feoffment becomes absolute. Same authorities, and 10 Mod. 288. 1 Co. 98. C. Roy. 35. 1 Forr. 440. — For the estate is executed, and cannot be devested, but by the default of feoffee. Actus Dei, nemini facit injuriam. — In other words, the law will not deprive him of an interest already vested, unless he has been guilty of some default.

5. So, of feoffment &c. on condition that feoffee shall, within 6 months, perform a certain voyage for feoffor: The voyage is then prohibited by Statute. the same, and 1 Forr. 444-5. 2 P. W. 218. 3 Bro. P. C. 384. 5 St. 269. Sal. 196. 8 Mod. 51. — It becomes impossible, by an act of the law. "Municipal Law." 27

p. 51. 141.

So, of a feoffment, grant &c. with condition that feoffee &c. shall, within 6 months, marry feoffor; and feoffor, within that time, marries another. Same authorities. — Here, performance being made impossible, by the act of the feoffor, he can take

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no advantage of non performance. The estate, of course, becomes absolute in the feoffee.

But if such a condition is annexed to a contract executory, and becomes impossible, by the act of God, or of the law, the obligation is saved and obligor is discharged. 1 Bow. 208. 417. 420. Cal. 170. 1 Mod. 209. 1 T.R. 384. Doug. 659. 1 T.R. 638. 2 H. Bl. 120. 128. Co. L. 206. b. J. 142.

The rule is the same, if the condition becomes impossible by the act of the party, in whose favour the contract is made; as the obligee. J. 137.

(*Note. Secus, if the obligor disables himself to perform the condition: For he cannot take advantage of his own wrong. (5 Co. 21. a.) He is then liable even before the time fixed for performance. see also. (Esp. 430. 2 H. 522. 6 Johns. 110.)) — For, the contract being executory, no advantage can be taken of it, agt. the obligor, till there is a default in him. The law will not subject the obligor to a penalty, unless he is culpable in not having performed the condition

So, of a bond, with condition, that J. S. shall appear at such a court; and he dies in the mean time. 1 Bow. 208. and authorities supra — The obligor is discharged. (51)

So, if A. gives a bond, with condition, that he shall marry the obligee, by such a day, and the obligee, in the mean time, marries another; Same authorities, and 2 Vern. Rep. 240. 1 Bow. 417. 420. 8 Co. 92. Cro. E. 374. Co. L. 206. b.

So, of a bond, with condition that obligor export certain goods to obligee; and a stat. prohibits their exportation. Same, J. 50. 141. and. Salk. 198 Municipal Law. 27.

Conditions
Pos.ve and Impos.le

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If obligee either prevents, or dispenses with, the performance of the
3.137. condition; the obligation is discharged. 1 T.R. 638. L.d Ray. 684.
Doug. 659. 204-5. Wats. 97-99. Stra. 1235. 3 T.R. 590. 7 T. 383. 1 East,
619. 1 Esp. R. 53. Ex. Obligation conditioned to build obligee a house,
and he prevents obligor from working upon it.

If the act of a stranger is made necessary (by the terms of an
instrument), as evidence of a condition's being complied with, and he
(5.2) arbitrarily refuses to act; is the obligation saved? Qu. 2 H. Bl. 574.
5 Co. 23. 1 Roll. 452. 6 T.R. 710. — Note the case of insurance against
fire. 2 H. Bl. 574. 6 T.R. 710. But that was the case of condition pre-
cedent. 6 T.R. 710. Note. Suppose the condition to be subsequent.

If a bond is conditioned for the performance of either the one, or the
other, of two things; and one becomes impossible; the obligor is still
bound to perform the other, unless the impossibility was occasioned
by the obligee. 1 Bos. & P. 242. — Contra, 1 Bow. 398. 5 Co. 22. 10 Mod.
20. Salk. 170. Ex. To convey a house, or land; House burnt by
lightning.

3.114. If the condition becomes partially impossible, by act of God, or
of the law; still the obligor is bound to perform as much of it, as
is possible. Cy-pres. Ex. Bond for a deed of house and land - and
the house is destroyed by lightning. Bond for a lease for 60 years
and that; afterwards prohibits longer leases than for 40 years.
Obligor is bound to make lease for 40 years. 1 Bow. 448. 451. Hard.
284. Co. L. 352. 219. b. 2 Bl. R. 731. Palm. 552. 2 H. Bl. 103. 5 H. 1 Hob.
209. 211. 3 Bro. P. C. 389. 2 T.R. 254. 2 Bow. 31. Municipal Law, 26.

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If a contract contains a clause, making the party bound, the judge, whether a condition precedent is complied with; the clause is void; and the Jury are to decide whether it is complied with. 2 Dev. R. 408. — Resolved in Pennsylvania (1818) that on an agreement to sell goods for "approved" notes, vendor cannot arbitrarily refuse such as are clearly good.

III. If the condition is impossible at the time of making the contract; its operation depends upon its being subsequent or precedent. (53.)

A precedent condition, is one which must be performed, before the right, or estate, dependant upon it, can vest, or accrue.

A subsequent condition, is one, by which a right, or an estate, already vested, is to be defeated. 2 Bl. 150-7. Co. L. 206.

Rule: If a precedent condition, is impossible at the time; the right, or estate, which is the subject of the contract, can never vest, or take effect: It is void, ab initio. For no right, or estate passes, till the condition is performed. 1 Pow. 200. 2 Bl. 157. Co. L. 205.

If the condition, being possible at the time, afterwards becomes impossible; the right, or estate, I suppose, becomes void; for it cannot vest. Ex. Lease to A. to take effect from a certain future day - if before that day, he shall marry B; and B. dies, before the day.

So, if a precedent condition is unlawful; for no right can be acquired, by performance of an unlawful act. 2 Bl. 157. Ex. Lease to J. S. to take effect, on a future day, if before that time, he shall do a certain illegal act.

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But if a subsequent condition is impossible at the time, it has no effect; the contract is, in law unconditional. Ex. A feoffment with condition, that unless feoffee shall go to Rome in a day, the feoffment shall be void. 1 Com. 200. 2 Bl. 150-7. Co. L. 206.

So, of a bond with the same condition — It is single. same authorities.
For in the case of the feoffment, the estate is vested; and in the case of the bond, the penalty is debitum in praesenti; and a void condition, cannot defeat either. 2 Bl. 157.

54 But in the case of Executory Contracts, as bonds, recognizances, &c. if the impossible condition is incorporated with the body of the obligation, instead of being underwritten, or indorsed, the whole obligation is void. 1 Com. 207. 1 Salk. 172. — For there is no debitum in praesenti — No distinct penal part, creating a present debt. It is rather in nature of a condition precedent, and must be so, in effect, I think, in every case of this kind —

55 Of Contracts, and Agreements, Required, by Statute Law, to be Written.

The Common Law distinction between Special, and Simple, Contracts See Post — "Consideration"

Contracts.

There is also a distinction between written, and unwritten, contracts, introduced in certain cases by the Stat. of Frauds and Perjuries, 29. Charles II. 1 Bac. 72. 2 Bl. 154. 1 Com. 269. - Written.

Our Stat. on the same subject was enacted in 1771. and is, substantially, a transcript of the English. (Ch. C. 354.) -

Under the Stat. of Frauds &c. the following contracts or agreements, will not support an action, or suit, in law, or equity, unless the agreement, or some note or memorandum of it, is in writing, signed by the party to be charged, or by some other person by him authorized. 1 Com. 270. Stat. Ct. 216. 1 Bac. 72. 2 Bl. 154.

I. Promise by Executor or Administrator, to answer, out of his own estate, for any debt, or duty, of his testator &c. - Such a promise, not in writing, does not bind him. (50.)

II. A promise by one person, to answer for the debt, default, or miscarriage, of another.

III. A promise upon consideration of marriage.

IV. "Contracts or Sales" of lands, tenements, &c. or of any interest in, or concerning them"* (See passages marked thus * in page 57.) By "Contracts or Sales," are meant sales, or contracts for sales.

V. Contracts not to be performed within 1 year, from the time of making them.

VI. Contracts for the sale of goods of £10. value, or, in Con. of £ 33. value. It extends as well to Executory contracts, as to contracts for sale, to be executed immediately. Rob. 111, &c. 2 H. Bl. 63. 7 J. R. 14. (57)

Written.

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"Title by Deed, 2.3" -

* By the English Stat: it is provided, that all parol sales, or leases, of lands &c or of any interest in them, shall operate as leases, or estates, at will, only; except leases, for a term not exceeding 3 years, reserving a rent of 2/3 of the improved value - Rob. 240-7. 1 Bac. 72. 4 T. R. 680. 3 H. 16. But the former are now holden tenancies from year to year. 8 T. R. 3. In Connt. all parol leases &c. for any term, however short, are placed on the same footing, as leases, however long, or sales of the freehold: i.e. they cannot be enforced, in law or equity.

58. The object of the Stat; is to prevent the proof of contracts, or agreements, of the above descriptions, by parol evidence; it being supposed, that there is danger of fraud, and perjury, in doing it. i.e. of fraud, through the medium of perjury. 1 Bow. 269. &c. - Hence the title of the Statute.

I. As to Promises by Executors, &c. — It has been said, that if the Executor &c. has assets to answer &c, his parol promise shall bind him: As assets constitute a consideration, advantageous to himself, so as to transfer the duty to him personally. 1 Ves. 120. 125. 5 T. R. 8. — 2n. No such authority. Not law, semb. clearly. See Post, 82. and 7 T. R. 350. 1 Rob. 205-7. Stra. 873. — The duty is not transferred to him, personally (i.e. in his private capacity), by assets. The mere Poss. of assets subjects him only as Executor &c. Otherwise, why is he not always sued, in his own individual character? Besides, the Stat. does not proceed upon a distinction between agreements upon consideration, and agreements without any. For a promise by parol, without consideration, would have been void before the Stat. was made: And if every parol promise, upon consideration, is good since; the statute provision is a dead letter - (Post. 69.) A fortiori, proof of assets will clearly not raise an implied promise to charge

the Executor of. personally. 5 T. R. 690. Toll. Ex. 404. Once holden contra by Lord King (case cited, Comp. 288. 7 T. R. 355-1.

Administrator's submitting a claim ag.t him to arbitrament, was once holden (obiter) to be and admission of assets. 1 T. R. 691-2. this opinion is overruled. 5 T. R. 6. 7 Ves. 453. Toll. 488. For an administrator may be desirous of thus ascertaining the existence, or amount, of a claim, without knowing whether he has assets. 59 Geo. 3

But if, on such submission, the arbitrator awards that the administrator shall pay a certain sum; he cannot, afterwards, deny assets, to that amount, ag.t the other party. It is equivalent to a finding of assets, to that amount. 7 T. R. 453. Toll. 488. Same rule as to Executors - fee. Award, 10.

Once holden, that payment of interest, by Executor, was an admission of assets, to the amount of the principal; or rather, that it threw the onus probandi, on Executor. Unreasonable; and, now, overruled. 5 T. R. 8. Toll. 484.

But acceptance of a bill of exchange, by drawee's executor, is an admission of assets, and being in writing, binds him. Ch. 82-3. 1 2. 176. Al. 822. 3 Wils. 1. 2 Stra. 1266. Burr. 1225-1 T. R. 487. - Otherwise, third persons might be deceived and defrauded. Besides. the act plainly implies the admission.

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So, is a transfer by holders Executor. Ch. 111-12. 3 Wils. 1. & 2 Stra. 1250. - The indorsement being tantamount to the drawing of a new bill.

p. 69. And tho' the promise by executor &c. be in writing, he is still not bound, unless some sufficient consideration is shewn; as assets in his hands, or forbearance of a suit. Toll. Ex. 484. 1 Ves. 125. Comp. 293. Bro. P. C. 551. - For it is a simple contract only. 7 T. R. 350. n. The mere fact, that the testator, &c. was indebted, is not sufficient, as a consideration.

For the object of the Stat. is not to make executors &c. liable at all events, and in all cases, when the promise is written; but in those cases only, in which, before the stat. he would have been liable on a parol promise. 7 T. R. 350. n. Rob. 202. 1 Ves. 126. And to make the executor personally liable, on his promise, tho' written, there must have been an existing claim, which bound him as executor, - Secus, there can be no consideration. Rob. on Stat. Frauds. 206. n. 2 Saund. 136. Eng. Jac. 47.

p. 71. 94. The consideration must appear in writing. *(*Note. Aliter under the 5th clause; post, 94) 5 East, 10. 6 T. R. 307. Rob. 115. 207. For the stat. requires the "agreement" to be written: And that term includes the consideration: i.e. the consideration must appear in writing.

To take advantage of this clause, defendant must have been executor &c. when he made the promise. Rob. 201. Amb. 330. Ex. Promise by one, in consideration of being, afterwards, appointed administrator, is not within the stat.

Not necessary, in an action on the promise, to aver assets. For (61.)
defendant is subjected, if at all, de bonis propriis. Rob. 205-5.

II. To answer for the debt, default, or miscarriage of another. (62.)

Under this clause, this general distinction is to be observed: If the promise, made for the benefit of another, is original, it is binding, tho' by parol. Secus, if collateral. Ld. Ray. 1087. Comb. 227. 1 Wils. 305. Esp. 101-2. 3 Burr. 1881. In the latter case, it is a promise to answer for the debt &c, of another; in the former it is not. Note. The words, "original," or "collateral," is not used in the Stat. An original promise, is not a promise to pay another's debt, but one's own. Collateral is to pay another's.

A promise is said to be original, 1st When the third person, for whose benefit it is made, is not liable at all; (for the same debt, or duty), to the promisee; so that there is no debt &c. on his part. Rob. 209. 210. Peake's Ev. 212. Bull. 281. 3 Burr. 1921.

2nd When his liability, (tho' before existing), is extinguished, on the promise's being made. Rob. 223-4. (Questioned, post.)

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Where there is a new consideration, arising out of a new and distinct transaction, or res gesta, and moving to the promissor. Buna. 1850. Rob. 232. 3 Esp. R. 80: So that the original debt is only the measure of what is to be paid for another object. 2 East, 325. For whenever the case answers either of the above descriptions, the promise is not, in construction of law, or in effect, to answer for the debt &c. of another.

4th " Where the promissor was under a prior moral obligation, to pay for a benefit, received by another. Bull. 281. Peak. Ev. 213.

(3.) But where the promise is merely in aid of a subsisting, and continuing liability, (for the same debt, a duty), on the part of such third person; or to procure credit for him — (i.e. where the promise is intended merely to furnish an additional security, and remedy) — it is collateral, and, therefore, within the stat. (Authorities to these distinctions; 2 Saq. 455. 5 Mod. 205. 2 Wils. 94. 1 H. 305. El. Ray. 1085-6. Salk. 27. Esp. 101-2. 1 Bos. & P. 158. 176. Bl. 120. Comb. 400. Peak. Ev. 212.)) — For in all such cases the promise is, in effect, to answer for the debt &c. of another. 1 Ex. Gr. A says to a merchant, "Deliver goods to J. S. and charge them to me," or, "Deliver them on my account; or "Deliver, and I will pay you;" — The promise is original: For J. S. is not liable at all; A. is the original debtor. 2 T. R. 81. 176. Bl. 120. El. Ray. 1087. Rob. 209. 210. — It is not a promise to "answer for the debt &c. of another, but his own.

But if A. had said, "Deliver to J. S." (ut supra) "and if he does not pay you, I will," it is collateral. Comb. 227. Here the intent is, that the charge should be, in the first

instance, agt. I.S. the receiver: He is, therefore, the original debtor; and the promise is, of course, collateral. 1 H. Bl. 120. Ld. Ray. 1080. Salk. 28. Esp. 102 — It is, therefore, a promise by A. to pay I.S.'s debt, in aid of his liability, and to procure credit for him.

So "supply my mother-in-law with bread, and I will see you paid" — holden collateral, or rather, according to the latest opinions, prima facie, &c: because of the presumed intent, as in last case (cited in 2 T.R. 80-1) Rob. 223. Ld. Ray. 224. 1 Bos. & P. 158. — Salk. 28. contra obiter.

Lord Mansfield once held, that such a promise before the delivery of the property, was original; there being then no liability on the third person (cited Comb. 228-9 — This opinion, however, has since been overruled. 2 T.R. 81. Rob. Stat. Fr. 209-10. — Sed qu. Whether Lord Mansfield's construction of the promise is not correct; in other words, whether the intention is not, that promisor shall be made the debtor, in the first instance. — At any rate, it is now holden, that when the promise is in this form, the court, in collecting the intention, are at liberty to consider all the circumstances of the case, and the situation of the parties. 1 Bos. & P. 158. Rob. 2 & 2, & 223. Ex. Gr. "Supply such a seaman," (bound to Canton) "with necessaries for the voyage, and at the end of 3 months I will see you paid" — the seaman having no friends, or means of payment, here. — This I should think original, as evincing an understanding that the necessaries were to be charged, in the first instance, to the promisor. — "If you do not know I.S. you know me, and I will see you paid." Holden collateral — I.S. to be first charged. 2 T.R. 80. Esp. 101-2. Rob. 210-11. Such was the evident intent. (64.)

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So, a promise by me, that in consideration of your letting a horse to J. S. he shall redeliver him, is collateral — This is plainly undertaking to answer for the default of another; to procure him credit. Rob. 232. For J. S. is liable on the bailment. Rob. 219. 232. 1 Sal. 27. 6 Mod. 248. L^d Ray. 1085. Holt. 685. 3 Salk. 15. 1 Bac. 75-5.

65. And, as a general rule a promise that a third person shall do an act, for not doing which he would be liable, is collateral. L. Ray. 1085.

Secus, if he would not be liable: Ex. If A. promises B. on sufficient consideration, that C. shall pay, and if not, that he, (A) will — C. not being privy to it; the promise, is in substance, original, tho' in form, collateral. For C. is not liable, at all. Ex. "Let me your horse, and J. S. shall pay you — if he does not, I will." Rob. 223. Fitz Gib. 302.

So, if an agent buys goods at auction, and does not name his principal; the agent is bound without writing. Peak. Ev. 213. 3 Burr. 1921. For he contracts as for himself.

It seems, to make the promise collateral, it is necessary, that the third party, for whose benefit C. should not only be liable, upon the same consideration, but that he should be, or become, liable, at the time, when the other's promise is made; L^d Ray. 1085-7. Rob. 219, 6. 222, 6. 232; and upon the same contract which the promisor
7.67. makes, or assumes. (See, two last cases) Ex. If after goods are delivered to J. S. for his benefit, by my direction, that they should be so delivered and charged to me, he should contract to pay for them; my promise is still original. He was not liable, when I promised. His promise, in this case, would be collateral.

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If the promise is by one of several persons, already liable; it is original, and not within the stat. For it is not to pay the debt of another, Ex. Promise to pay costs, by one of two defendants. Rob. 229. 5 Mod. 285. Comb. 302. 2 East, 325. 5 Mod. 213. see 2 Esp. R. 484.

When, according to the distinctions under this class of cases, the promise is original, the action of debt, or of general indebitatus assumpsit, (not stating the special agreement) is proper. For the promisor is the original debtor. Secus, where the promise is collateral: There a special declaration is necessary: As, upon a mutter collateral promise. Rob. 210. 1 Burr. 373. 3 Lev. 388. L^d Ray. 1085. For he is only a guarantee.

2^nd A promise in consideration that promisee will extinguish a debt ag^t a third person, is original. For it is not in aid of a continuing liability in the third person, or to obtain credit for him. Ex. "Burn I. S's bond, and I will pay the debt." 3 Burr. 1888. arguendo, admitted — 1 Wm. R. 130-1. Dub. Rob. 223, &c. 1 W. R. 130. Sed qu. whether the rule is not correct. What is promisor to pay? Not I. S's debt; it is extinguished, before the promisor is bound to pay. The former debt ag^t I. S. is only the measure of the amount to be paid; or a rule of damages; and the consideration is surely sufficient; it being disadvantageous to the promisee: Indeed the mere act of destroying the bond is sufficient consideration.

D. D. p. 08.

Where promisor is the purchaser of the debt of another, his promise to pay for it, is clearly not within the Stat. Rob. 220. 1 Wm. R. 130. 2 East, 325. This is a promise, not to pay the debt of another; but to pay for a transfer of it. Ex. Gr. "Transfer to me I. S's bond, and I will pay you the amount of it." Like a promise to pay for any chattel purchased.

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Stat. of Frauds. 3rd. (See page 62 (x) for the rule.) In Williams v. Leper, where landlord came to distrein lessee's goods for rent, J. S. to whom they had been assigned, promised to pay the rent, if the landlord would not distrein: Holden good (tho' lessee remained liable) Plff. had a lien which he gave up, in favour of defendant, on his promise to pay. 3 Burr. 1886. Peak. Ev. 213. 2 East. 325. 1 Esp. 121. n: 3 Esp. 86.

(67.) The consideration, in this case, arose out of a new and distinct transaction and moved to the promissor. viz. the abandonment of a lien (which was a valuable interest), in his favour. 3 Burr. 1886. Rob. 232 cf. 3 Esp. R. 86. It was in consideration of the fund's being disencumbered in the defendant's favour – The debt was only the measure of the sum to be paid. Like a promise to pay another for resigning his property to promissor. Sal. 25. Ld. Ray. 775. 3 Esp. 86. Salk. 28. 3 Esp. R. 86. 3 East, 325.

4th Where one is under a moral obligation to pay for a benefit, received p. 109. by another; a parol promise by the former, is original, and will bind him. Bull. 281. Peak. Ev. 213. Ex. Gr. Medicine furnished to a pauper – The overseers afterwards promise to pay for it. The promise is binding. Not treated as a promise to pay another's debt.

Miscellaneous Rules.

A promise to pay a certain sum, in consideration of promissee's withdrawing a suit agt. J. S. for assault and battery, has been holden original. For there was no debt, due from J. S. It did not appear that there was any default &c in him. See 2 Day. 457. 1 Wils. 305. 7 T. R. 204. Rob. 208. Peak. Ev. 214. Rob. 233. 4. – The promise was not for performance of same duty. J. S. was never liable to pay the particular sum promised – or, to the particular duty, which the promise was intended

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to create. ante, 5 T.

There must exist ag.t a third person, a debt, or duty, ascertained, or capable of being ascertained, at the time of the promise; (Rob. ubi supra;) to bring the promise within the Stat. 3 T. 57.

But a promise to pay, in consideration of promisee's staying a suit, brought ag.t J. S. for a debt, is collateral. The debt subsists ag.t J. S; and no lien, or interest, assigned, or abandoned, by promisee, as in the 3rd class. Rob. 208. 233-4. 2 Wils. 94. 3 Burr. 1887, arguendo. T. R. 201. vide 2 H. Bl. 312 Stra. 873. — Contra, 3 Burr. 1887, argu; Amb. 330. (68)

(See next page)

And a promise, that, in consideration of promisee's forbearing an action of trover ag.t J. S. the promisor would pay the damages, is collateral, and within the Stat. 2 Day, 455. — Same duty. It is to pay the same sum, which J. S. is liable to pay; i.e. the value of the property.

Suppose the promise to be in consideration of promisee's withdrawing the suit. Would it not be good in England; as a retraxit disables the Plff ever to bring another suit? (3 Bl. 295); So that J. S's liability is extinguished. — In Con.t not good. Here retraxit has no such operation. 3. 62.

Promise to pay J. S's debt, if Plff would release J. S. taken on mesne process, is collateral, I suppose; for the debt continues, and J. S. may be arrested again. (See "Sheriff's &c.")

Stat. of Frauds. Secus, I conclude, if he has been taken on final process, and were thus released. For releasing him would discharge the debt. 4 Burr. 2482. 1 T.R. 557. 6 H. 525. 7 H. 421. — Root, 57 contra.

(9.) Some have supposed, that where there arises a new consideration, a parol promise to answer for the debt of another is good, (whether the consideration moves to promissor — out of a distinct transaction, — or not; and whether the debt is discharged or not) — 3 Burr. 1887, argu; Amb. 330; as forbearance of a suit. But this is not law. (See last page, and page 58.) — 2 Wils. 94. see Rob. 232-3. Bull. 281-2. 2 Day, 457. 7 T.R. 201. Stra. 873. — Statute words be negatory; and the rule under it, the same as at C. L. (Rob. 239.) For the parol promise would not be good at C. L. without consideration: And if it were now good, wherever there is a consideration, the stat. words have no effect.

7. 80. And tho' the promise is in writing, it is not good without consideration. Rob. 202. 207-8. 7 T.R. 345-350. Stra. 873.

(10.) A mutter promise to pay the debt of another, if he does not, is discharged by promisee's granting forbearance to the debtor. (Kirb. 397.) There is a tacit understanding, that the creditor is to collect it of the debtor, if he can.

7 76. A Judicial confession by the defend^t excluding the necessity of proof, will prevent the application of the Stat. Ex. Tender pleaded, and money paid into Court. Rob. 238. Peak. R. 15. Peak. Ev. 204. — For the parol promise is not made void, as a promise; the stat. merely excludes parol evidence to establish it.

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When, according to the above rules, the promise must be written to be binding, it is not necessary, in declaring, to aver that it is written. Sufficient if it appears in evidence. Rob. 202. 156. Ray. 450. Bull. 279. 1 Bac 75. 3 Burr. 1890. For the stat. introduces a new rule of evidence only, not a new rule of pleading. 3 T.R. 155. 1 Saund. 9. a. n. 1. 2 Ch. Pl. 214. n. o.

This rule holds, as to all the contracts contemplated by the statute Comb. 289. 2 Root 148. 12 Mod. 540. 4 Bac 655. (1.)

Ergo, demurrer to the declaration, confesses a promise in writing; (Root, 77-8. 7 T.R. 350. n.): Or rather, it cannot be objected, under the demurrer, that the promise is not in writing - no proof being necessary. That which dispenses with proof, is tantamount to full proof, by the proper evidence.

Secus, if such contract is pleaded in bar of another action. Rob. 202. n. 2 Wils. 49. Bull. 279. Ray. 450. Greater strictness required in a bar, than in a declaration.

But it is necessary, in declaring, as well as in pleas in bar, to shew a consideration. 7 T. 350. Rob. 202. p. 60.

A parol contract to pay the debt of another, and also to do some other thing is within the stat. in toto. For one part of an entire contract, (i.e. upon one, and the same consideration), is void; the whole is so. No severance. 2 Vent. 223. 7 T.R. 201-4. Rob. 212. n. 173. n. 231. 1 Nev. R. 130, 6. Anstr. 420. 425. n. Both parts must be declared upon. p. 8 &

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(72.) IIIII. Agreements in consideration of marriage.

This clause relates not to promises to marry. These are good by parol. Bull. 280. 1 Fonbl. 179. L. Ray. 385. Stra. 34. Rob. 196. — 1 Lev. 65. 411 contra.

It relates only to agreements in consideration of marriage; i.e. such as are made by way of marriage settlement, or family provision. 1 Forr. 277-8. 1 P. W. 518. Pr. Ch. 526.

These to be binding, must be written and signed. (No exceptions to this rule, except in case of part performance, post.)

Formerly doubted, whether a parol agreement, of this kind, would not be good, if it was stipulated, that it should be reduced to writing. 1 Forr. 279. 1 Ch. Ca. 135.

But such stipulation, it seems, makes no difference; and does not take the case out of the Statute. 1 Forr. 281. 2 Ch. Ch. 402. 3 Atk. 504.

(73.) If, however, such stipulation is made, and the execution of it is prevented by the fraud of either party, and the marriage takes effect; Equity will enforce the agreement. 1 Eq. Ca. abr. 19. Rob. 135-7 198. Pre. Ch. 526. 1 P. W. 518. — But this is done by way of relief against fraud, I conclude: Executing the agreement being the means of relieving ag.t the fraud.

And a parol promise, made on one side, on marriage, is a sufficient consideration to support a settlement, made in pursuance of it, on the other side, after marriage — or, to support a promise in writing, after marriage. Stra. 2 86. 2 Lev. 140. 1 Ves. Jun. 195. Rob. 197.

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Stat. of Frauds.

197-200. For the stat. does not make the contract by parol, void; but merely prevents the proof of it, by parol testimony, in support of a suit.

A letter, signed by one party, is a writing within the stat. 1 Vent. 179. 2 Bro. Ch. 32. 3 Atk. 318. 1 Ves. Jun. 330. 1 Vern. 287. 2 Vent. 361. Pr. Ch. 500. 3 Atk. 503. Bob. 190-1. 105, 6.

But, it must appear, that the other party accepted the terms, contained in the letter, and acted in contemplation of them, in proceeding to marry: Otherwise it is not binding. Thus, where the party, to whom the offer in the letter was made, was ignorant of the promise contained in it, at the time of the marriage, it was not decreed. 1 Vent. 179. 2 P. W. 85. 1 Vern. 287, of. 290. 2 Mod. 3. Bob. 107-8. 192-3. Ex. Where A. wrote a letter to his daughter, which was not shewn to her intended husband. 1 Vent. 193. Here was no agreement.

p. 93.

A letter written to one's own agent stating the terms of an agreement, already made by parol, has been holden sufficient. 3 Atk. 503. Bob. 121. — This, tho' not a written agreement, is a written memorandum of it — written evidence.

p. 94. p. 92. 93, 9.

It must furnish distinctly, the terms of the agreement — Secus, it is uncertain. 1 Vent. 179. Pr. Ch. 500. Chan. 426. 1 Atk. 12. Bob. 106. 191. 1 Vern. 290. See 2 Eq. Ca. Abr. 17.

p. 93.

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(73.) IV. Contracts for the sale of land &c. or for any interest in them. Root, 59.

p. 82 "Lands &c." — A thing annexed to land, if sold in contemplation of severance, is not within the stat. Ex. Trees growing — Crops &c. Rob. 120. 6 East, 602. Selw. 882. 11 East, 362. 1 Com. Cont. 74–80. 3 Day, 476. Peak. Ev. 214. 3 Lev. 65. L^d Ray. 182. Bull. 282. 1 Bos. & P. 397. And a parol agreement between the owner and occupier of land, that each shall have a certain part of the crop, is good, semb. (1 Bos. 397). For the crop is not considered as land. (Note. By the English stat. parol leases for 3 years, are good. Such agreement, however, appears to be good, independantly of that provision. vide "Trespass".

Formerly doubted, (as under last head), whether a parol contract would bind, or not, if it was part of the agreement, that it should be written. 1 Vern. 279. 283. 1 Vern. 157–159. 1 Eq. Ca. abr. 19. Now settled, that this makes no difference. 1 Vern. 281–3. 1 P. W. 770. 1 Vern. 221. 6 Bro. P. C. 45. Rob. 147. Pre. Ch. 402. 2 Bro. Ch. 555. 563.

Parol promise to pay for land bought, is good. 1 Root 77–8. 479. But our Court of Errors has decided, that the law does not imply a promise to pay the value. Brace, v. Catlin

Once decided in Con^t that a parol agreement by grantor, at the time of granting, to pay for any deficiency in the supposed contents, was within the stat.* Hint. 22. 1 Root 75. — Contra, since (Sperry v. Rathrop, Aug^t. 1805) (Note. * In that case, notes were given for the purchase money, and the promises reciprocal — Reversed by the Court of Errors, June, 1802, on C. L. principles. 1 Day. 23. 3 Johns. 508. 1 N. 418. — Suppose no obligation given for the purchase money —

Might not assumpsit lie? It would contradict no writing; and the subject matter of the promise is only money. Stat. of Frauds.

But Parol agreements for sale of lands &c. are binding in some cases, the Statute notwithstanding (70.

Such agreements under the Stat. are good, if proveable consistently with the spirit of the act, and the rules of evidence. There is no inherent imbecility in the contract: the difficulty is in proving it. The Stat. merely introduces a new rule of evidence, to prevent frauds and perjuries.

1. Where there is no danger of fraud, a perjury, in enforcing the agreement, the case is said not to be within the spirit of the act. Ex. If on a bill filed for specific performance, the defendant, in his answer, confesses the agreement. No danger of fraud, or perjury, in acting on such proof. 1 Vern. 271. 292. 1 Ves. 221. 444. Pre. ch. 208. 374. 2 Atk. 100. 155. 3 Atk. 3. 1 Bl. R. 600-2. 2 Br. ch. 508. Amb. 588. See 5 Ves. Jun. 37. 554. p. 70.

Besides, says Powell, the contract is in writing; i.e. in the answer. 1 Vern. 292. But this is not a sound reason. (77 a.)

In this last case, if defendant does not insist on the Stat. he is clearly bound: (Rob. 155. 161. 2 Br. ch. 505. 4 Ves. Jun. 23. Peake. Ev. 215.)

So, if he expressly submits to a decree of performance. Rob. 155. - And if Plff alleges a written agreement; evidence of a Parol one, will be good, if defendant does not insist on the Stat. Rob. 155.

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2nd. As to the first example, if defendant, (tho' admitting the agreement) insists on the Stat. by plea. Can the agreement then be enforced? Rob. 159. 166. Fr. Ch. 208. 374. Peake's Ev. 215. vide 3 Atk. 3, That Chanc[y] wou'd decree it, "tho' the defendant had insisted on not "performing it." — 2 Atk. 155 — Defendant did insist on the Stat. by pleading; yet, he having confessed the agreement, in his answer, the Plea was over ruled, and the execution of the agreement decreed. 2 Bro. Ch. 508.

(76.) In 1 Bl. R. 600, rule laid down generally, that an agreement confessed, is out of the Stat; by Lord Mansfield.

Decided contra at Law, (i.e) that if defendant, having confessed the agreement, by answer in Chanc[y] insists on the Stat. he is not liable on the agreement. 2 W. Bl. 63. 6 Vez. Jun[r] 548. 2 Rob. 238. Rob. 157. — So, by Lord Coxsylvn, 4 Ves. Jun[r] 23. See 1 Bl. 37. Rob. 160-1. So, by Baron Eyre, 2 Bro. Ch. 503-4.

In 2 Bro. Ch. 559. the Plea of the Stat. was allowed, by Lord Thurlow, tho' the agreement was not denied. But this decision was on the special circumstances of the case. (2 Br. Ch. 564.) The agreement was incomplete: only general heads by way of instructions to an attorney: Particular terms not settled — Hocks Penitentiae was taken. See Rob. 160. Fr. 559. See 6 Br. P. C. 45. cited 2 Br. Ch. 567-8.) Here the agreement was not confessed.

(77.) It remains questio vexata. 1 Hovt. 170-1. Rob. 160. Mitf. 211. sed vide Rob. 238. Roberts says, (Page, 238) "It seems to be now nearly established that defendant may admit the agreement, and plead the stat. cites 6 Ves. Jun[r] 144.

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Rob. 147. n. See Peak. Ev. 210.

If insisting on the Stat. prevents a remedy on the agreement, the rule itself, that confession in the answer, takes the agreement out of the Stat; seems arbitrary and groundless. 2 Br. Ch. 507.

And if the court, knowing the agreement to be by Parol, can enforce in one case, i.e. when the Stat. is not pleaded; why not in the other? as little danger of Perjury, in the one case, as in the other.

It is also a question unsettled, whether a defendant in Chancy; on a bill for a specific performance of a Parol agreement for a sale of Lands &c. is bound either to confess, or deny, it, in his answer. 1 Vern. 168. 170.

Decided, by Lord Mansfield, that he is. (case cited by Lord Thurlow. 2 Br. Ch. 510. C. Pltf's. 211-12. — Contra — Rob. 150-7. 160. Gilb. Ch. 155. See 4 Ves. Jun. 24.

(80)

Lord Thurlow of the same opinion; and that the only effect of the Stat; (as to the proof of the agreement), is to prevent the Pltff from proving it, aliunde. 2 Bro. Ch. 507. 1 Vern. 170. Rob. 157. So that, if defendant denies it, Pltff cannot prove it by Parol. 6 Ves. Jun. 39. Lords, Macclesfield, Hardwick, Mansfield, and Thurlow, held that confession takes it out of the Stat. Lords, Loughborough, now Lord Rosslyn, Eyre (supra) and Eldon, of the contrary opinion. (2 H. Bl. 56); because compelling the defendant to answer a Parol agreement, lays him under temptation to commit Perjury. What then? Does not this objection hold equally in every case, in which defendant in chancy is bound to answer? Perjury by defendant is not what the Stat. was intended to prevent. Besides, this objection might be urged ag.t compelling an answer, even if the agreement is

matter; in which case, however, the defendant is clearly compellable to answer.

If he is bound to confess or deny; it seems to follow that his confession takes the agreement out of the Stat; and that insisting on the stat. will not avail him. Cot. 160. For if it would not cui bono compel him to confess or deny? Cont. 71.

(81.) It has also been holden, in England, that a Party to a parol agreement for sale of land; tho' he denies it in answer shall be bound by a previous confession out of court can be proved. 3 Atk. 417. 1 Ves. 2 13. This cannot be law.

Upon the above principle, viz. that there is no danger of fraud, or perjury, in the case, a parol contract for the purchase of land at a vendue sale, before a master in Chancy under the order of the Court, is binding. 1 Sch. 271-4. Reg. 218-20. 1 Ch. Cl. 259. 1 Ch. Ch. 334. Cot. 115. Even on the stat. of the parol contract void?

So, a parol agreement between the Solicitors in Chancy in a suit between Mortgagor and mortgagee, was decreed. 3 Ch. Ch. 334. Cot. 115. n.

Again; according to several opinions, a parol contract respecting an interest in land is if inferable from circumstantial facts, in proving which there is no danger of perjury, is binding. Ex. Sale of land by absolute deed; but vendor, at the execution, gives an obligation to vendee, to the amount of the consideration; remains in poss., pays the taxes; does not account for profits; pays no rent; and pays interest on the obligation — Upon these facts it is said, a trust is implied for vendee (i.e. he is considered as mortgagor by virtue of a

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Parol agreement implied, or inferred. Pow. M. 65. 3 Wood. 429. 2 Veg. 370. 2 Atk. 1. Ch. Ch. 526. Talb. 60. 2 Vern. 424. 1 P. W. 351. 2 Atk. 549. 1 Vern. 116. — Sanford v. Washburn Sup. Ct. — reversed by Ct. of E. Sed qu: No such judicial decision.

2nd Div. Other exceptions to the general rule introduced by the Statute admitted, on the principle, that an act, made to prevent fraud, ought not to receive such a construction as would protect and encourage it. 1 Bl. R. 600. 1 Pow. 294-5. 1 Fonb. 171-2 — Nor the act is to be liberally expounded. 1 Bl. R. 601. (82.)

So that, where a Party, by not performing a Parol agreement, will practice a greater fraud on the other, than would result from a mere breach of the agreement itself, he is generally holden to it in Chan. Rob. 131-2-8-

Therefore, a Parol agreement performed, or partly performed, on one side, at the request, or with the consent, of the other Party, will bind the latter. Ex. A. leases to B. by Parol, for 21 years: B. enters under the lease, and begins to build, or incurs Expenses in improvements. The contract is enforced in Chan. ag. Lessor. 1 Fonb. 172 1 Pow. 295, &c. 1 Bl. R. 600. 1 Veg. 221. Stra. 783. 3 Atk. 100. 2 Vern. 373. 699. 1 Ab. 383. 1 Veg. 83. 297. 1 Bac. 14. Hut. 329. 1 Vern. 159. 7 Veg. Jun. 341. 3 Ab. 378. Rob. 130-2-5. 1 Root 77-8. (83.)

Otherwise, A. might take advantage of his own fraud. For his accepting, or permitting, part performance by B. (not intending to perform himself), is, in itself, a fraud. 3 Wood. 433-5. 2 Eq. Ca. Ab. 45. 9 Mod. 37. Ch. Ch. 501. 1 Br. Ch. 417. 1 Bos. & P. 397. — Besides, the acts done, (A. acquiescing) afford presumptive evidence of the agreement;

and thus the danger of perjury is diminished. 1 Vern. 309. Qu. whether this circumstance has any operation? Rob. 131-2. 138

In such a case, the agreement has been enforced, tho the terms of it were not precisely settled by the parties. 1 Vern. 297. 2 Eq. Ca. abr. 17. 45. 5 Ves. 523.

(84.) Delivering poss.n of land, in pursuance of a parol agreement is a sufficient part performance, by vendor. 1 Vern. 299-300. 1 Vern. 305. 2 Ab. 363. 455. Bunb. 94. 2 Eq. Ca. abr. 45. 6 Bro. P. C. 102. 1 Root 77-8. Rob. 147-8. & Sta. 783. 3 Br. Ch. 409. Fr. Ch. 16. 518-19. 7 Ves. Jun.r 147. — Ct fortiori, is it so, if the purchaser, being let into poss.n builds, or makes improvements. 1 Madd. 383-4. Sta. 783. 1 P. W. 770. 2 Mod. 37.

And taking poss.n under the agreement is deemed sufficient notice to a subsequent purchaser (Semb.) So that the first purchaser, under the parol agreement, will hold ag.t him. 1 Vern. 302. 1 Vern. 363. 2 Ab. 383.

So, payment of money as part of the consideration of a purchase by a parol agreement, has been holden to be such a part performance, by vendee, as to take the agreement out of the stat.te 1 Vern. 304-5. Rob. 153-4-5. 5 Ves. 523. 3 Atk. 2. 4 Ves. Jun.r 720. 1 Ves. 83. 222. 1 Bac. 54. 1 Cont. 176. Fr. ch. 550. Jac. 3 Ves. Jun. 713. Rob. 133-4. 155. 2 Vern. Qu. Vent., 2 Eq. Ca. abr. 46. Sugd. 74-81. 9 Ves. Jun.r 234. 1 Ecbol. and Lefroy, 43. 22. Com. Contracts 82, 83. As the money may be recovered back. — The prevailing opinion seems now to be, that payment even of the whole purchase money, does not take a case out of the stat. See 1 Madd. 302-3-4. 5 Ves. Jun.r 712. 382. 1 Ab. 22. 1 Ab. (32.

32.37. Sch. and Lefr. 5.

But payment of earnest (Pr. Ch. 580. 1 Vent. 175. 1 Root 54) is, by all the obinions, not a part performance — This is not in any sense, a part performance; not subsequent to and in pursuance of, the agreement; but a mere solemnity in making the contract; a form in stipulating. In this case says Powell, damages may be recovered at Law, for non performance. (1 Vern. 308). 2nd. For payment of earnest does not take the case out of the Stat. Pre. Ch. 580. 4 Vez. Jun. 720. Rob. 154-5. The earnest, itself, may, doubtless, be recovered back. (85.)

Questioned, whether the receipt of the money, in part performance, may be proved by parol. 1 Vern. 30; -8. — If not, the rule that such part execution takes the case out of the Stat. seems idle. However, the rule itself seems, now, to be generally denied. Rob. 183-4. a. In 3 Atk. 4, it was proved by parol.

And a parol agreement, in part performance, by vendee, so as to bind the vendor, will decreed ag.t his heir. 1 Vern 309. 2 Atk. 2. Finch, 300.

But to take the parol agreement out of the Stat. on this ground, the act done, must be such, as wants prejudice the party claiming, unless the agreement were enforced. Hence part performance, by one of the parties, will not entitle the other to a decree. 7 Vez. Jun. 341. Rob. 138. 162. 5 Br. P. C. 45. 4.57.

(86.) Any the act, claimed to have been done in part performance, must (to take the agreement out of the statute), be such, as, in the opinion of the court, would not have been done, but with a view to perform the agreement. Secus, it is not considered as part performance. Ex. Lessee agreed to take a new lease, of, and continued in poss.ⁿ: This was not such a part execution, as to take the case out of the stat. Lessee only remained, as he was before. 3 Veg. Jun.ʳ 378. Rod. 139, of. 154. 1 Ves. 309. 1 Bac. 74. 2 Bro. ch. 514. 561. 3 Atk. 4. 1 Id. 12. Amb. 585. Pre. ch. 561. 1 Fonb. 175. 1 Bro. ch. 412. 6 Bro. P. C. 45.

Giving poss.ⁿ is sufficient; (ante, 84.) Secus, of giving directions for conveyances: Going to view the estate, &c. these are merely introductory, or ancillary to a conveyance. 1 Fonb. 175. 6 Bro. P. 46. 45. Rod. 139-40. 162. Amb. 585. 1 Bro. ch. 412. 3 Veg. Jun.ʳ 34. 379. 6 Id. 41. 1 Madd. 303-4.

Marriage, is not, of itself, considered as such a part performance of a parol agreement in consideration of marriage, as to take the agreement out of the Stat, as between the parties to the marriage: For by the terms of such contracts, they are not to have effect, unless that marriage takes place. To consider marriage, then, as a part performance, dispensing with written evidence, would take every case
(87.) out of the stat, and leave the contract, as at C. L. 1 Vern. 309. 1 Bac. 74. Fr. ch. 561. Stra. 738. 1 P. W. 618. Rob. 190-8.

But it is said, that a parol contract, (in consideration of marriage), by a third person, (as a father to one of the parties), is taken out of the Stat. by the marriage, if it takes place with his consent. Secus, a fraud would be effected on the parties to the marriage. 1 Vern. 294-9. 2 Vern. 373. 2 Freem. 201. 1 Vern. 297 & 309.

So, where the wife was allowed by the husband, during coverture, to recieve the interest of a certain sum which he had, before marriage, agreed to settle to her seperate use; the agreement was adjudged binding, it is said, on the ground of part performance. 1 Vern. 304. 1 Ves. 297. — Qu. Could Husband be bound by his own part performance? It was no prejudice to the wife. (Note. The plea was bad, in this case, and the agreement decreed, on the special circumstances.) 7 85.

So, cutting down timber, in pursuance of a marriage agreement, was holden a sufficient part performance, to bind the other party. 1 Vern. 304. 2 Eq. Ca. 29.

Our Court of Errors have holden, that part performance in paying money, does not take a parol agreement out of the Statute. Once holden by Sup. Court, that a complete performance on one side, by payment of money, did. (Kirb. 349) And the Sup. Court, have, since, holden part payment sufficient. See also, 2 Day, 225, that payment of part, and making repairs, takes out of the Stat. (88.)

Upon the same principle, (i.e. to prevent fraud), even a written contract, respecting an interest in lands, or any other subject, may be contradicted, by proving the parol agreement, if there was a fraud in the execution of the instrument. Ex. Grantee, having obtained a deed, refused to execute a defeazance according to agreement. Rob. 130-1. 3 Atk. 389. 5 Vin. 423. 1 Forb. 188. 1 P. W. 620. 2 Atk. 203. 1 Eq. Ca. abr. 20. 1 Vern 294. See case of a marksman (2 Atk. 389), decieved as to the contents of the deed: & Proof of the parol agreement being the necessary means of proving the fraud.

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So a parol contract of any kind may be proved, where it is only inducement to an action for fraud. For the action is not on the contract. 2 Day, 531: For the agreement is but an instrument, or means, by which the fraud is effected — so that proving the agreement is only showing the manner, in which the fraud was practised, and thus, in effect, proving merely the fraud itself. Ex. Action for a conspiracy to defraud Plaintiff, by a sale of lands.

The same may be done, in case of mistake in the execution. 1 Vent. 188. 193. 1 Vez. 457. 2 Atk. 375. 2 Atk. 203. 3 Atk. 389. 1 Vern. 433. 8 T. R. 571. Flint. 399.

(89.) So, a written agreement, (ut supra) may be controlled by a parol one, to rebut an equity. Ex. Written agreement, afterwards discharged by parol. 2 Vez. 199. 1 Vern. 240. 1 Vern. 294. "Powers of Chancery", p. 6. This rule is peculiar to Equity.

"Use "Evidence, 2."

In England by stat 11 Geo. 2nd, indebitatus assumpsit for use and occupation, lies on a parol lease; and the agreement as to the rent, may be given in evidence, to ascertain the damages. Esp. 20. 185. 1 T. R. 378. 8 Atk. 327. 2 Bl. R. 1249. 1 H. Bl. 235. 1 Wils. 314.

At Common Law, assumpsit would not lie for rent; tho' debt would. Esp. 20. Hutt. 34. Doug. 234. Hob. 284. 1 Ch. R. 97. 1 Rol. 7. Cro. Jac. 414. 598 Cro. Eliz. 242. 3 Lev. 180. 3 Wood, 152. Bull. 137. Peak Ev. 241. 3 Freem. 234. 2 Com. Dig. 509. Debt being considered as the higher remedy. Qu, as to the principle.

In Connecticut such a lease does not create a tenancy at will. It is a mere license. But a *Assumpsit* lies on a quantum valebat. 4 Day 328.

Possession must not be adverse in this case. Esp. 20-1. 1 Gr. 378.

V. Contracts not to be performed within one year from the making. (90
Ex. A promise to pay, or do an act two years hence.

Holden that this clause does not extend to any agreement concerning lands or tenements. 1 Pow. 276. 1 Vern. 159. vide. 8 J. R. 327. Because, (I suppose), the preceding clause has made all the provisions intended to be made, as to contracts of that kind. They are generally of no effect, whenever to be performed. — Suppose, then, a parol contract of this kind, (i.e. concerning land, and not to be executed within a year), confessed, or partly executed. It is binding, I conclude. 1 Root, 89.

Where the performance is to take place on a contingent event, which may, or may not, happen within a year, that contract is not within the statute. Ex. On the return of a ship. 2 Salk. 280. Rob. 185-7. Bull. 280. Stra. 505. 3 Burr. 1278. L^d Ray. 310-17. 873. 3 Salk. 9. Holt, 320. Peak. Ev. 214.

So, to pay on A's marriage. Skin. 353. L^d Ray. 910. Rob. 187. (91

So a promise to leave a sum of money to promissee by will. Bull. 280. 3 Burr. 1278. —

And to make such contingent contract binding there is no need of the contingency's actually happening within a year; for the contract is good, or not so, ab initio. L'd Ray. 317. 3 Burr. 1281.

This clause, then, extends only to contracts, which, according to their express terms, are not to be performed within a year. 3 Burr. 1281. Peake's Ev. 214.

And even as to these, it is held in Conn. that where the promise is made upon a contingency and accruing consideration, it is good, though by parol, if to be performed within a year from the time when the consideration is complete. Ex. Parol promise to pay for boarding one's child two years. Holden good. 1 Root, 89. Ged, Jr.

VII. The sixth class of contracts contemplated by the statute seems not to require a distinct examination. Except, that the consideration need not appear in writing: the "promise" (the term in the statute is "bargain") only being required to be written 6 East, 307.

Rules, applying to all, or several, of the different Contracts contemplated by the Statute. (92.)

The construction of the stat. is the same in Chancery as at Law; the remedy, or relief, may be different. 1 Bl. R. 60. 3 Bl. 430-1. 1 Hont. 22. — Intention of the Legislature governs both; and construction is merely the means of discovering that intention. 1 Pow. 370.

"Agreement," or, "note or memorandum in writing," what?

Any writing, I suppose, which is intended to furnish evidence of the contract, is an agreement, or a note or memorandum, within the Statute.

Therefore, a letter, written by one party, is a "note" &c. 1 Hont. 179. 1 Pow. 287-8. Rob. 105-6. 2 Bro. ch. 32. 2 H. 318. 3 Atk. 503. 1 Vern. 201. 2 H. 322. J. 74.

A letter written to one's own agent, stating the terms of an agreement made, holden sufficient. 3 Atk. 503. Rob. 121. (93.) J. 74.

But it must distinctly furnish the terms of the agreement. Seems, not binding. 1 Hont. 174. Pr. ch. 550. Stra. 426. 1 Atk. 12. 1 Pow. 290. Rob. 105-7. Jer. 2 Eq. Ca. ab. 17. J. 74.

But the terms of the agreement, a memorandum may be made certain, by reference, in the mitten agreement or memorandum, to other documents, or extrinsic facts. 3 Bro. Ch. 318. Rob. 107. 1 Ves. Sen.r 330. 2 Bos. & P. 238. Rob. 115. — Ex. Agreement to convey for the same price as I.S. gave — or, the same land, as is described in such a deed.

p. 73- It must also appear that the other party accepted the terms, and acted upon the offer. 1 Hunt. Pig. 2 P.W. 65. 1 Pow. 287-8. 9 Mod. 3. Secus, there is no agreement. 5 Vin. 527 Rob. 107-8. 192-3.

When the muting refers to something extrinsic, by which it is to be made certain, if the subject is not made sufficiently certain by the thing referred to, itself, no parol evidence is admitted to make it more so. Rob. 105. n. 1 Ves. Sen.r 326. Ex. Gr. Reference to a deed, which does not ascertain the subject or terms. Agreement too uncertain.

(94.) An advertisement, mitten, or printed, (Post, 95) by one of the parties, and containing the terms, is a sufficient note &c. Kirb. 14. Bl. R. 569. 3 Burr. 1921.

p. 60- And, in the first five classes of agreements, embraced by the statute, the consideration, as well as the promise, must appear in the muting. The "agreement" &c. is required by the statute to be in muting. East, 10. Rob. 110. 2 Bos.

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6 East 307. 4 Bann. & Ald. 601. 3 Johns. 3. 210. 1 Phill. 440. 17 Mass. 12. 6 Cow. R. 81.
Rule, aliter, where the guaranty is simultaneous with the original undertaking, and they form but one transaction. 8 Johns. 29. 11 H. 221. 1 Phill. 446. n. Sed. qu.

Secus, as to contracts for sale of goods of £10. value, under the English statute. "Note, or memorandum" of the bargain only, is mentioned. 6 East. 307. Rob. 117. "Agreement" is not mentioned — "Bargain" construed as "promise"; semb. 1 Phill. 440. 5 East. 10. 9 H. 348. 15 H. 272. 15 Ves. Jun. 287. 14 H. 190. 3 Johns. R. 210. — p. 91

An instrument, intended as a deed, but failing to operate as such, from the omission of some requisite, or by a change in the relative situation of the parties, may be considered in Equity as an agreement, or as evidence of an agreement. Ex. Bond to one's intended wife, to convey lands to her. 2 P. W. 242. Rob. 109. (Being a debitum in presente, it is, as a bond, avoided, by the marriage). — So, of an instrument in the form of a deed, but not witnessed, as our statute law requires.

An agreement imports the Privity and assent of both parties. Hence, a mere entry in a steward's book, is no evidence of an agreement between lord and tenant. 1 Atk. 497. Rob. 109.

(19.)

Signing, what?

Not only a subscription in usual form, at the foot of the writing, but the name of the party to be bound, written by himself (or authorized agent) in any part of the instrument, if intended to give authenticity to it, is a sufficient signing. 1 Wils. 118. 2 Eq. Ca. Ab. 32 - 1 Vez. 6. 2 Atk. 503. 1 Bos. 283-4. 1 Fonb. 167. Ex. "I, A.B. agree with C.D. to sell to him Blackacre" &c, not subscribed. It is sufficient. Fee. Esp. 23. - Sha. 399. 2 Ray. 1370. ("Devises, 17") Rob. 120-3. 3 Lev. 1. 80. 9 Ves. Jun. 249. 2 Bos. & P. 238. 1 Esb. R. 190.

Secus, where the name, written in the body of the instrument, is not intended to give authenticity to it. Ex. A. having agreed to lease to B. by parol, wrote instructions for drawing the lease, in these words: "The lease to be renewed: A. to pay taxes" &c. This is no signing by A. His name was inserted merely to explain the stipulations, not to authenticate the agreement. 1 Fonb. 166-7. 15 W. 771. 1 Bos. 285. Ab. 121. It was not in the form of an instrument - not intended as such.

It seems to have been formerly supposed that one party's making alterations, with his own hand, in the draught of the agreement, was a sufficient signing. 1 Vern. 220-1. 1 Fonb. 163-5.

(20.) But this opinion is overruled. 15 W. 770. 1 Fonb. 166. 1 Bos. 284.

But one's signature, as a subscribing witness (he knowing the contents), is a sufficient signing to bind him, to any stipulation, recited in the writing, on his part. Ex. Where Marriage p. 14.
articles, reciting that the mother of one of the Parties had agreed to advance £1000, as a portion, were subscribed by her, as a witness, she was holden bound, though not, in form, a Party. For the signing was intended to give authenticity. 1 Ves. S. 1 Wils. 318. 1 Pow. 284. — The subscribing witness may be considered, in such cases, as having adopted the agreement, as his. Rob. 123-4. Or, at any rate, it may be considered as a note, or memorandum, of

Who must sign.

(97.)

Sufficient, if the Party, against whom it has signed, if there is evidence of the acquiescence of the other. Ex. A draws an agreement, and procures B. to sign, though he himself does not. B. is bound. 1 Bro. Ch. 504. 3 Ves. Jun. 351. 2 Ch. Ca. 164. 1 Pow. 286. 2 Vern. 373. 1 Eq. Ca. Abr. 20. 2 Ib. 33. 3 Ves. Jun. 265. Rob. 115. 124. 1 Madd. 334-5. Newl. 155. 171. See vide. Rob. 117. 124. 1 Sch. and Lefr. 20. New. 155. 171. Sugd. 54.

In the last case it is said, A. also is bound; for procuring B. to sign, made B's subscription a signing authorized by A: And a signing by the procurement of one party, is equivalent to a signing by his agent. 1 Bos. 287. 2 Ca. Ca. ab. 21. 10. 2 Ch. Ca. 184. 2 P. 2 Ju. for it is not a signing in A's name, and does not import to be a signing for him.

At any rate, if the party, not signing, brings a bill for specific performance, he is bound, (admit); for he then recognizes and virtually affirms the agreement as to himself. 1 Ves. 82. Rob. 124. Doubtless, the Court would not, in such case, decree against defendant, but upon condition of performance by the Plff.

So, auctioneers subscribing highest bidder's name to the condition of sale, is said to be a sufficient signing for both parties. In thus subscribing, he is said to act as agent for both. Bull. 280. 1 Bl. R. 599. 3 Burr. 1921: Semble 5 B & A. 333. Where the auctioneer brings the action in his own name.

98.

The rule is holden to apply only to the sales of goods. 1 Esp. R. 107. 1 Bos. & P. 305. 1 Ves. Jun. 324. Peak. Ev. 217. — 2 Ju. 9 Ves. Jun. 249. Rob. 115.

Quere, where the subject matter is an interest in lands &c. — Where the "agreement" or some "note &c" of it, must be in writing; which the subscription, by an auctioneer, is held not to be. (8 T. R. 15.) The case cited was that of sale of the aftermath of land.

It has been doubted, indeed, whether sales at public auction are contemplated by the Statute, at all. The transaction being public, and so no danger of perjury. Bull. 280. 1 Bl. R. 600. 3 Burr. 1921. But it does not appear, by any direct authority, or by any reasonable rule of construction, that such sales stand upon a footing different from others.

A Printed name may be a sufficient signature. Ex. A trader's bill of Parcels, with his name printed. (ante 94.) 2 Bos. & P. 238 n. 238. Rob. 124. For the name is printed by his procurement, and delivered as his signature.

It is not necessary, that the authority of an agent, signing for his principal, should be in writing. The Statute requires only that the "agreement" be in writing, signed, &c. 4 Vin. Title, Contracts. H. 40. 3 Wood 427. 9 Ves. Jun. 250. (99, 7)
See Title by Deed, 36.

Not necessary that the identical contract stated, should be signed. Sufficient, if it is acknowledged by a writing that is signed. Rob. 121. 3 Bro. Ch. 318. See 3 Atk. 503. Ex. Letter to one's own agent, stating the terms of an agreement already made. This is a memorandum in writing of the agreement. 3. 74.

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The bare writing of an agreement with the party's own hand, does not dispense with the necessity of signing. 1 P.W. 770. Rob. 121.

(100) Of the Consideration necessary to support a Contract.

Contract is "an agreement, upon sufficient consideration, to do, or not to do, a particular thing". 2 Bl. 442. According to this definition, a consideration is of the essence of every contract.

Consideration is the material cause of a contract; that, in consideration, or on account, of which, each party is induced to give his assent. 1 Pow. 330. 2 Bl. 443-4.

"Title by Deed. 19-

Considerations are of two kinds: II. Good. III. Valuable.

II. A good consideration is that of kindred, or natural affection between near relations. 2 Bl. 297. 444. 3 Co. 83. 1 Pow. 301. 1 Vern. 427. 1 Fonb. 337. The most distant relation embraced in the term "near relation", is that of uncle & nephew, or the 3d degree.

Such a consideration, in Contracts executed, is sufficient, as between the parties. Ex. Grant by deed from father to son, in consideration of natural affection

But as against creditors, and bona fide purchasers, generally deemed fraudulent, and set aside. 2 Bl. 297.

And an executory contract, on such consideration, may be enforced in chancery, in many cases. 1 Pow. 361. 369. 1 Ves. 407. 2 P. W. 175. (101.)

III. Valuable: This consists in something of pecuniary value: As money, goods, labour, marriage (2 Bl. 297): Indemnity to Partner for becoming surety, &c. 1 Burr. 452.

Contracts on valuable consideration, may be made in either of four ways:

I. By stipulating thus: "Do, ut des:" As loans on bond, or promise. Sales, on contract, expressed, or implied, to pay &c.

II. "Facio, ut facias." As where labor, or service, is to be performed on both sides; or forbearance on one side, and some act on the other; or mutual forbearance.

III. "Facio, ut des:" As an act to be performed for reward.

IV. "Do, ut facias;" the counterpart of the last, or the last inverted: As giving, or agreeing to give, something, for an act to be done. 2 Bl. 444. 445. 1 Pow. 335-6. (102.)

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Contracts, under the present view, are divided into two kinds. II Special. III. Simple. 7 J.R. 331 n.

A Special contract, is one, which is entered into, and evidenced, by Specialty — i.e. by deed, or writing sealed. 2 Bl. 465. 2 Gr. Co. L. 671.

A Simple contract, is a contract by Parol, or one reduced to writing, but not sealed. A contract in writing, but not sealed, and a Parol contract, are, by the common law, upon the same footing, in Point of Solemnity. Rob. on Fr. Convs 99. 7 J.R. 331 n. 2 Bl. 465-6. — In strictness, indeed, a writing, not sealed, is mere evidence of a Parol contract.

7. 50 In Conn.† Written instruments, containing express promises, a covenants, whether sealed, or not, are, in general, treated as specialties. And the English law relating to specialties, as to lies here generally, it is said, to written contracts not sealed, as well as to those sealed, if they contain an express promise, or covenant. 1 Sw. 373. Rowland v. Walker, Sup. Ct. Hartford County, January, 1812. — See. Sw. Ev.2 — Qud, qu: as to the extent of this position. Does it extend to any other unsealed writings, than promissory notes† not negotiable? (expressed to be for value received)

It is clear, that an executory contract by parol, is not binding, without a consideration. 1 Bos. 330. 338. 2 Bl. 445. Salk. 129. Plowd. 302. 309. Dy. 306. 335. b. L^d Ray. 909. 5 T. R. 143. 1 Fonb. 326-333. — It is nudum pactum; and ex nudo pacto non oritur actio. Ex. A promise to give me £100. — or to labor, without reward, &c.

But if owner of goods delivers them to another, on latter's promise to carry, or bestow labor upon, them without reward; delivery sufficient consideration, and promise binding. 5 T. R. 143. L^d Ray. 149. 920. Doctor & Stud^t 129. 1 Bos. 304. Bailment, 81-2. J. 118.

But by Wilmot, J. a contract, in writing, is good, without consideration, at common law. 3 Burr. 1669. 2 Bl. 440. This proposition is too broad. 1 Bos. 339-42. 246. 242. — As to the case, but by Blackstone, of a promissory note (2 Bl. 440); it is to be observed, that, as between the original parties, an actual consideration is necessary, and must be proved. 1 Bos. 341. Chitty 71-2. 75. 7 T. R. 351. 2. 121. 3 T. R. 421. 707. Doug. 514. Kyd. 155. 1 Fonb. 335. 4 Mod. 242. Str. 674. Bull. 274. Rob. on Fr. Con. 99-100.

Though, after a negotiable note is negotiated, promisor cannot, indeed, in general, aver the want of consideration; Because a third person becomes the holder; and he ought not to be affected by the want of consideration, between the prior parties. 1 Bos. 341. 2 T. R. 71. 1 Fonb. 335. — If it were otherwise, third persons, who are bona fide holders, would be defrauded.

(104.) But, at common law, merely reducing a contract to writing does not supersede the necessity of consideration. (ante, 102.) And I conceive that in strictness, and in judgement of law, a consideration is necessary to the validity of a sealed instrument, or specialty. P. Though 1st, plaintiff need not prove a consideration; and 2nd, the defendant cannot, at law, aver the want of it. For 1st, From the solemnity of the instrument a consideration is presumed: And, therefore, the plaintiff is not bound to prove one. 1 Ves. 374. 1 Pow. 232-3. Hard. 308. 3 Burr. 1637. 1 Fonb. 334. 2 Bl. 445. Hard. 200. — 2nd, A consideration being presumed, or implied, if defendant might disprove it, he might contradict his deed; which cannot be. He is estopped to deny it. 1 Pow. 340. 2 Bl. 295. Hard. 434. 1 H. B. 344. L. Ray. 729. 1550. "Title by Deed, 20".

Suppose, that the want of consideration appears upon the face of the specialty. Is it void? So considered (semb.) 2 T. R. 5 n. Vide. 4 Burr. 2072. 3 Bl. 1089. 7 T. R. 477. 3 Bl. 438. 1 Pow. 308. 7 Co. 40. 2 Atk. 152.

(105.) Result: That, on principle, a consideration seems necessary to the validity of a specialty, where the contract is executory: But that it is binding, unless the want of a consideration appears in the instrument, or in some other instrument, of equal solemnity, which is parcel of the contract. vide, Rob. on Fr. Con. 96. 97.

Contracts.

See 1 Powell, 341-2. That on voluntary covenants under seal, only nominal damages are recovered at law. This supposes the contract obligatory. But is the want of consideration supposed to appear in the instrument? What is the meaning? (3 P. W. 222. 2 Ib. 248. 1 Vez. 514. Rob. Fr. Cu. 550. 1 Bro. ch. 12. 1 Atk. 10. Fr. ch. 475 as to relief in voluntary bonds in Equity) If the want of consideration does not thus appear, how can it be proved? It cannot be proved. Per Lord Kenyon in Petrie v. Hannay, 3 T. R. 418. — If it does so appear, is not the contract valid, or void, in toto? — Wats. 171.

The rule that a consideration is necessary to every contract, applies, practically, in its full extent, to executory contracts only. A contract executed, by delivery of the subject, is good without consideration, as between the parties: as a gift. 1 Bac. 238. Doug. 20-1. Esp. 577. Stra. 955. For the contract being executed, by the parties, the Law will not rescind it — though it would not enforce the agreement, if executory. (102.)

Holden in Conn. that the consideration expressed in a deed of land, is conclusive evidence (between the parties) of the existence of the consideration; presumptive only, as to the amount, and receipt of it. Sec. 7 Co. 40. 1 Root. 77. 479. "Titles by Deed, 26."

A consideration may arise, it has been said, only in one of two ways.

I. From something advantageous to the party promising, or undertaking; or,

III. From something disadvantageous to the party in whose favour it. 1 Pow. 342. 1 Fonb. 330. 1 Com. 149. — Too narrow a
p. 109. rule. (Lord Mansfield — Cowp. 290. 294.

(107.) II. From something advantageous to promisor & Ex. In consideration of my selling and delivering goods to I. S. today, he promises to pay hereafter. Here the consideration is something advantageous to him.

The quantum of consideration is immaterial. The law does not, in this instance, regard proportions. Sufficient if there is any value. Ex. A peppercorn. 2 Vern. 213. 2 Pow. 352. 1 Wils. 233. 2 Ves. 518. Secus, of a rush; because of no value.

Idle, or insignificant, considerations are not deemed considerations in law. 1 Pow. 355. Esp. 94. 2 Rol. 23. Cro. E. 205.

But any thing, however trifling, to be done by him, in whose favour the agreement is made, is a sufficient consideration. Ex. A. leases to B. — B. assigns to C. — rent becomes due, and C. promises to pay it; if A. will show him the lease. Here showing the lease is a sufficient consideration; and gives A. an action on the promise. 1 Pow. 343. Cro. El. 87. 150. Cro. C. 70. Dy. 272.

(108.) The mere relation of landlord and tenant is a sufficient consideration for a promise. Ex. Declaration, stating the defendant to be tenant &c. and that, in consideration

thereof, he promised to carry away from the farm, straw &c. – Holden sufficient. 5 T. R. 373.

III. From something disadvantageous to him, in whose favour C. Ex. A. having a bond against B. delivers it up, to be cancelled, on C's promising to pay the contents. 1 Com. 344. 348. Hob. 4. 5. Cro. Jac. 342. Cro. El. 74-5. 849. 881. Hob. 210. 1 Rol. 22. Com. 126.

As a consequence of the general rule (page 100) as to the two modes, in which a consideration may arise; it is also a General Rule, that a contract is not supported by a consideration altogether past, and executed. Ex. In consideration, that one has bailed my servant, or discharged me of a trespass, or built me a house gratis, I promise to pay &c. This is not binding. There is no subsisting consideration; no previous debt, or duty; and no benefit, or disadvantage, accruing to either, in consequence of the promise. 1 Com. 348. Sy. 272. Hoord. 5. 362. Cro. El. 442. 741. 885. 1 Rol. 11. 2 Bulstr. 73. Esh. 87. 95. For the promise is not the procuring cause of the consideration "Assumpsit, 33".

But though a part of the consideration be past, and executed, yet, if a part is subsisting; the contract may be good. Ex. Lessor, in consideration that lessee had occupied, and paid the rent, promised to save the latter harmless in future. This is good. For though the occupation and rent paid, were past, yet the lessee was to continue in poss.x and to pay future rent. 1 Com. 349-50. 2 Bulstr. 73. Cro. El. 94. Cro. C. 109. 3 Salk. 90. (109.)

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The general rule in Page 100, is too narrow (Comp 290.294) and the rule, that a Past consideration will not support a contract, is now somewhat relaxed. Stra. 933. 3 Burr. 1671-2. See Hutt. 84. 2 Leon. 111.

Thus a Contract, on consideration Past and executed, is good, if there was a previous legal duty on Promisor. Ex. If one, in consideration of a previous indebtedness, promises to pay, it is good. Here, however, the duty continues. So, where the defendant promised, in consideration of the Plff's having buried his child.* (Note. *By statute 43 Eliz. it is made the duty of Parents to bury their children.) - See Statute 43. Eliz. - 1 Pow. 350-1. 1 Bd. R. 413. 1 Leon. 198. T. Ray. 280. Cro. Eliz. 138. 3 Burr. 1671-2.

So, if there was a prior moral obligation on Promisor; this is a sufficient consideration. Ex. Promise to pay a just debt, barred by the Statute of Limitations. 1 Hare 330. T. Ray. 259. 2 Bl. 845. 1 Pow. 351. Comp. 290. 294. Esb. 95. Bull. 147. Promise by overseers, to pay for medicine, before furnished to a Pauper. Bull. 281. Peake. Ev. 213.

T. 67.

(110.) So, a promise, by Putative father, to pay for past nursing of his natural child. But the law will not, in such case, raise an implied promise. 2 East, 580.

So, a consideration Past, will support a contract, if the consideration accrues at the request of the Promisor; for the contract, though subsequent, couples itself with the previous request, by relation; and, therefore, operates, as if

made, at the time of the request. Ex. Promise to pay, in consideration that I. S. had, at my request, baited my Servant. 1 Pow. 351-2. 2 Vent. 268. 3 Salk. 96. 1 Bulst. 120. Dy. 272. Hob. 105. Cro. Chas. 409. Cro. Jac. 18. Cro. Eliz. 42. 282. Esp. 95. 1 Fonb. 336.

It has been holden, that a mere stranger to a meretorious act, done by another, cannot support an action, in his own name, on a contract founded upon it. For he does nothing advantageous to promisor, or disadvantageous to himself: He is a stranger to the consideration. Ex. A. in consideration that B. will acquit him of a trespass, covenants with B. to pay C. 100 £. — C. cannot sue upon the covenant. 1 Pow. 343. 353. 8 T. R. 330. 1 H. 559. Vin. 183. Ch. 220. Cro. Jac. 887. 2 Rol. 441. 597. 1 Vent. 5. — Ged vide. 1 Bos. & P. 101-2. 8 Mod. 117. Com. 443. Yelv. 24. 3 P. W. 35-8. 5 Bac. 200-1. 185. 4 Vin. 15. 5 Burr. 2680. Bull 35.

This rule seems now to be confined to deeds inter partes. 3 Bos. & P. 148. n. 3 Lev. 139. Carth. 77. Cro. Eliz. 729. Yelv. 23. 1 Lev. 235.

But in the case of parol agreements, it seems settled by the late authorities, that the third person may maintain the action 3 Bos. & P. 148. n. 1 H. 101-2. 1 Johns. 140. 2 Ev. Pothi. 132. Styles. 290. Comb. 219. 8 Mod. 117. He is to be considered, I conclude, as adopting, and ratifying the contract by his subsequent assent.

In such cases, the promise should be laid, as having been made to the plaintiff; and proof of a promise to another, for his benefit, will support the declaration. semb. 1 Bos. & P. 101. (111)

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It has always been agreed, that a consideration moving from one, will support a promise to him, in favour of another, who is nearly related to him. Ex. Promise to A. in consideration that he would perform a cure, to pay his daughter. 1 Pow. 353. 1 Vent. 318. 332. 2 Lev. 210. Ray. 302. But it appears, from the foregoing rules, that no such relation is now necessary; and that the promise is good, in favour of a stranger

When forbearance of a suit is the consideration, there are 3 requisites: II. It must be either general (i. e. perpetual), or, for a certain fixed period. III. It must be of an action in which the promisor, or person claimed to be liable, is chargeable; or, in which there is, at least, a colourable liability on his part. 1 Pow. 353-4. Cro. Eliz. 205. Esp. D. 95.

II. Ergo, promise to pay a debt, in consideration, that the plaintiff would abstain from suing, (no time being limited - and the forbearance not being expressed to be perpetual), is not good. 1 Pow. 353-4. Cro. El. 9. 455. — Promisee might sue the next day.

But promise to forbear a year, or a reasonable time, is a good consideration. Court to judge what is a reasonable time. Same authorities, and Esp. 95. Hutt. 108.

(112.) III. Promise by a mother to pay a debt, due from her son, who was dead, if plaintiff would forbear to sue her, is not obligatory. There is no consideration. She was not liable; forbearance is no favour to her, no disadvantage to promisee.

1 Por. 354-5. Hard. 73. 3 Salk. 96; and there is no moral obligation on her to pay.

So, if one is arrested on void process, and another, in consideration of his release, promises to pay, he is not bound. There is no consideration. 1 Por. 355-6. Esp. 94. Hard. 73. The release is only from false imprisonment.

So, promise by A. to pay B's debt, if the creditor will accept A. as his paymaster, and will forbear to sue A. for it for 6 months, is not good, even at common law: for he might sue B. immediately; ergo, no prejudice to creditor. 1 Por. 350. Hard. 73.

But a promise in consideration of forbearing a suit, is good, if there is a colourable ground for the suit. Ex. Infant, having bought silk and velvet, died. His executrix, in consideration of forbearance promised to pay. This is good at common law. For here was colour for a suit, she being executrix. — (113.)
1 Por. 350. Latch, 142. Dy. 272.

When a promise is in consideration of forbearance of suit, originally accruing against the promisor, himself, the original cause of action is not to be enquired into. It is acknowledged by the promise. 1 Por. 357. But the rule cannot hold, I trust, if it should appear in the declaration that the suit forborne was groundless* &c. 1 Por. 350. (*Note. The rule, I think, must be confined to cases in which, for aught that appears, by the terms of the contract, there may have been a good cause of action.

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The mere act of entrusting property with another, or his undertaking to do something respecting it, is a sufficient consideration. L^d Ray. 909. 910. 919-20. Co. Lac. 867. 5 T. R. 143. 1 Por. 364. Com. 133. 1 Sal. 20. 3 Sal. 11. Ex. Delivery of money, to be delivered over to another, without reward.

Bailment, 15." These sections are taken from page 511.

The preservation of the honor and peace of a family has been holden a sufficient consideration in Chancery. Ex. Agreement between father, and son, and natural child, to prevent family disputes &c. 1 Por. 362. 1 Atk. 3.

p. 17. So, the compromise of a doubtful right, has been holden sufficient in Chancery. 1 Por. 363. 1 Atk. 10. 1 Vern. 4. 2 Vent. 353. 2 Veg. 284.

These sections are from p. 119. Not necessary in Contracts, that the consideration be expressed in direct terms, as a consideration. Sufficient if one can be collected out of the whole agreement. 1 Por. 368. 1 Veg. 450. Ex. Agreement for settling boundaries.

But if an express consideration appears upon the face of the contract; the better opinion is, that no other can be implied. Expressum facit &c. ("Title By Deed" 21) 7 Co. 40. 1 Por. 368.

Contracts, when distinguished with reference to the forms of their considerations, may be divided into three kinds. Doug. 665.

Contracts.

II. Where that, which is stipulated on one side, is in consideration of performance of what is stipulated on the other. Here the considerations are termed mutual. Ex. A. agrees to pay B. for doing a certain act. Here the doing of the act, by B. is a condition precedent to his right to the payment. 1 Pow. 357. 1 Vent. 177. 214. 3 Salk. 95. Hob. 105. 1 Wm. R. 240. n. 12 Mod. 400. 1 Ford. 380. 1 H. Bl. 274-5. 277, arguendo. 7 Co. 10. — If he sues for the price, he must aver performance; 7 T.R. 130. See Pleadings, 2 D, see also Tender); or, what is equivalent to it: A Tender; or, that he was prevented by defendant; 1 T.R. 638. 645. 2 Ld. Ray. 886. Doug. 259. Stra. 1235. 5 Com. 50. 1 Rol. 455. Pl. 1. — or, (as the case may be), that he was at the place, ready to perform, and defendant absent; and that thus he was prevented from performing. 1 East, 203. 208. 209. 7 T.R. 125. Stra. 458. 2 Wm. R. 240. c. T. 137.

III. Where performance on both sides is to be concurrent. Here neither can compel the other to perform, till he has performed his part, or done what is equivalent ((Ex. Offered K. or, is at the place appointed, ready, and demands performance and the other refuses.)) Ex. A. promises to deliver B. a load of wheat on such a day, for such a price. 2 Wm. R. 240. c. 1 Saund. 320. c. 5 Com. 50. 1 East, 203. 209. 629. 7 T.R. 125. 8 T.R. 356. 4 T.R. 781 Salk. 171. 112. 113. Doug. 659. 665. 688. 176. Bl. 383. Stra. 535. (114.)

If a place is appointed for performance; it is sufficient that the Plaintiff was there, ready, and defendant absent. No tender is necessary, in such a case, to entitle Plaintiff to recover. 1 East, 203. 208. 4 T.R. 781. 7 T.R. 125. Stra. 458. Sal. 113. Doug. 685.

If defendant was to perform on request, it is sufficient that the plaintiff was ready, and requested, and defendant refused. 1 East, 203.

(115.) If then, the agreement is, that one shall do an act, for doing which, the other shall pay; the doing is a condition precedent. (supra). — But if, according to the terms of the contract, the money is to be paid on a day, which is to arrive, or may arrive, before the act can be performed, the doing of the act is not a condition precedent. 1 Saund. 320. a. b. 2 Wm. R. 240. a. Here action lies for the money before the thing is done. 1 Saund. 320. a. 1 Pont. 381. 8 Mod. 42. 5 Vin. 71. Ld. Ray. 652. 1 Pow. 358. Salk. 171. 7 Co. 10. b. 1 Vent. 147. 1 Saund. 319. 2 Wm. Bl. 889. 5 T.R. 572. 7 H. 135. Ex. Promise to pay such a sum for a year's labour — or for building a ship: The money to be paid in ten days. — Here, indeed, the payment may be a condition precedent.

So, if in the last case, (i.e. where a day is fixed for payment) no time is fixed for performance on the other side. 1 Saund. 320. a. 2 Wm. R. 223. — In both cases if the money is not paid, at the time appointed for payment, the party promising it is liable, whether the other has performed, or not.

But if the day, appointed for payment, is to arrive after the time, fixed for doing the act; performance of the act, is a condition precedent, and must be averred in an action for the money. 1 Pow. 358. Salk. 171. 3 Salk. 95. Sy. 75. 1 Rol. 114. 115 contra, not law) 1 Saund. 320. b. 2 Wm. R. 240 & n. 12 Mod. 462. 1 Ld. Ray. 665.

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IIII. But where the Promises are mutual, (or independant); i.e. where the Promise on each side is the consideration of the Promise on the other; Performance is not a condition precedent on either side. Either may sue, without averring performance. 1 Pow. 359. 360. Doug. 655. 1 Vent. 177. 214. Hob. 88. 1 Lev. 293. 3 Bulstr. 187. Hard. 102 - Sid. 24. 5 Mod. 411.

Secus, in Equity. Here Plaintiff must aver performance, or readiness to perform, though the covenants are mutual. Otherwise Equity will not interfere. 1 Font. 383. 1 Br. P. C. 184. Finch. 445. 12. 2 Prem. 35. - Its interposition being discretionary. He, who seeks Equity, must do equity; the court will interpose only on that condition.

If the agreement is in this form: I promise to pay £100, you transferring stock to me, and è converso; the promises are not mutual; (i.e. not independant); and neither can compel performance, till he has performed. Salk. 112. Holt. 653. 1 Font. 382. 12 Mod. 593. 1 H. Bl. 270. 4 T. R. 751. - 2n. As to the case in 2 Bl. R. 1312. vide 8 T. R. 372-5.

Where the covenant &c goes to only part of the consideration on both sides, and a breach of it may be paid for in damages, it is independant. 1 Saund. 320. b. 4 2n. Will action lie, unless Plaintiff has performed in part? 1 Saund. 320. c. 6 T. R. 570. 1 H. B. 273. 2 New. R. 240. b. n. 6 T. R. 573.

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(117.) The question, whether promises are mutual, or dependant, is to be determined by the meaning and understanding of the parties, to be collected from the spirit of the agreement, and the nature of the contract, (i.e.) from the order in which the intent requires their performance; not from the order, in which the stipulations precede, or follow, each other. Doug. 655. 13 R. 845. 7 St. 130. 8 St. 373. 6 St. 570. 658. Salk. 171. 1 Saund. 320. a. note. 2 New R. 240. St. 240. a. n.

Where the promises are mutual, (i.e. independant) it is no bar to an action, that the Plaintiff has not performed his part. Doug. 655. 2 Bl. R. 1312. 1 Font. 382. 3 Lev. 41. St. 10. Cowper 50. Each may have a cause of action against the other, at the same time.

The English courts, have leaned, of late, against construing promises independant. 4 T. R. 787. 8 St. 371. Grose, J. arguendo. Willes's R. 496. 1 East, 519.

(118.) Mutual Promises must both be binding, or neither will be so: i.e. the contract must be of such a nature, and in such terms, as will bind both sides; and both must be made at the same time. Secus, they are nuda facta. 1 Com. 360. Salk. 24. Hob. 88 (*) Note. Are not the terms of this rule rather too strong? For a voidable undertaking, or agreement, by an infant, will support a promise, made to him, by an adult; though a void one will not. See "Parent and Child"). I should say, "of such a nature &c. as may bind both." Ex. not illegal, or void, on either side.

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(119.) At Common Law, fraud in the consideration of a contract by specialty, does not, in general, vitiate it: As in the quality, or value, of the consideration. Ex. Bond for the price of an unsound horse. Though fraud in the execution, does. 2 Bl. 304. 2 Bac. 594. 2 Bo. 3. J. 11 Co: 27. 2 Lev. 422.
Absent wanties in the second case; not in the first.
Ex. Deed falsely read — wrong instrument substituted, by artifice. — Case of marksman, J. 88.

(120.) But Chancery will relieve against contracts, of any kind, for fraud in the consideration. 2 Vern. 145 & 2 P. W. 283. 3 Ib. 290. — At law the party defrauded must resort to his special action for the fraud. And such appears to have been the general rule, in relation to contracts executed, without deed: As in sales of goods, under false representations of soundness, &c. Peak. Ev. 233. 1 Camp. 39. 4 Esp. 95. 2 Str. 1109. But this rule, is, in the last case, much relaxed, by late decisions. See "Chesbay's on the Case". 17. — Does it now hold at all, in case of simple contracts?

But our courts have holden, that a total fraud, in the consideration of a note, or bond, i.e. when the promisor has received, and is to receive, nothing, is a good defence at law. See. 1 Root, 58. 305. Ex. Georgia land frauds. And, therefore, that in such cases, relief can not be had in Equity. (Knight, v. Morgan.) — if the instrument is in suit, at law.

(121.) Secus, where the fraud is partial. Here the relief is in equity; for courts of law must give judgement for the whole amount, or for defendant. Cannot apportion.

But, according to our rule, though the fraud is total; yet if the obligation is not in suit, (or if all the obligations are not in suit); relief may be had in Equity. Secus, the promissee would remain in jeopardy, till promissee would bring a suit at law.

(122.) Interpretation of Contracts.

The object of construing contracts, is to ascertain the intent of the parties. 1 Pow. 370.

And the contract, however expressed, cannot be carried beyond that intention. 1 Pow. 370-1.

Thus if A. grants that unless he pays B. 40l. per annum, B. may distrein for it on A's manor; a writ of annuity will not lie for it; because there is no grant of annuity or rent. 1 Pow. 371. Co. Litt. 140-7.

But it is a good rent-charge, for which B. may distrein. For the manor is charged with the distress. 1 Pow. 371. Co. L. 140-7. 2 Rolle. 425.

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Contracts are to be carried to the full extent intended, if the words can be so construed, as to effect it. Ex. Trust created to raise money out of the profits of an estate, carries, in Equity, a right to sell, if the sum cannot otherwise be raised within the time. 1 Fonb. 372.

(123.) Words are to be understood according to their ordinary and most known signification, unless there are decisive reasons to the contrary. 1 Fonb. 373. 375-6. 1 Bland. 169. "Municipal law." 1 Ch. R. 53-4. Cro. Ch. 385. Popl. 55. 2 Nov. R. 213.

Thus, if A. agrees for 20 barrels of ale, he is not to hold the barrels, after the ale is out. 1 Fonb. 374. Bland. 88.
Secus of an agreement for a hogshead of wine. Vendee has the hogshead. Same authorities. Such is the understanding of the parties, in such cases. Such the usage.

So, a lease for twelve months, is for 48 weeks only. i.e. 12 lunar months. But a lease for a twelvemonth, is for an entire year. So understood by the parties. "Bills of Exchang, 80." 1 Fonb. 375. 2 Bl. Com. 141. 5 Co. 81.

(124.) Words expressive of quantity, are construed, as understood at the Place, where spoken, or used. Ex. "Pounds," "bushels," &c. 1 Fonb. 376. Sheph. Epit. 172. Qu. If to be delivered at another place?

But if money is made payable by contract at a place named, its denominations are to be understood according to their import, where it is payable. Ex. Contract in London, to pay £100, in Dublin. The sum to be paid is £100, Irish currency. 1 Pow. 407. 2 P.W. 88. 895.

If the language is ambiguous, the intention may be inferred from the subject, the effect, and the circumstances. 1 Pow. 370-7.

II From the subject:

See. 131. Ex. Gr. Covenant for quiet enjoyment, extends not to tortious entries. 1 Pow. 403-4. 379. 384-9. Cro. Jac. 425. Cro. Eliz. 212. 213. Sho. 400. 3 T.R. 584. 4 H. 810. Hob. 34. Esp. 3. 273. 301. See "Covenant broken" — 4 Co. 80. 8 H. 91. b.
For the intention, as inferable from the subject, is merely to guarantee against higher title.

(125.) Grant of common out of all my manor. Grantee has common only in commonable places. Not in Grantor's garden &c. 1 Pow. 377.

So, grant of all the trees, growing on my farm, does not include fruit trees growing in my garden or orchard, if there are other trees growing on the land. 1 Pow. 378.

So, from necessity, ut res magis valeat, of an instrument may be construed, and take effect, as if it were, in form, and structure, an instrument of a different species: Ex. Feoffment or grant, by joint tenant to his companion, operates as a release; a covenant never to sue a debtor, as an acquittance of. Ray. 187. 4 Mod. 150. 2 Saund. 96. Cro. Eliz. 352. Salk. 574. 3 Salk, 298. 1 T.R. 445.

"Title by Deed. 59." "Heading 6."

II. From the Effects:

Thus if construing a contract according to the ordinary meaning of the words, will render it ineffectual, or frivolous, a different sense may be put upon them. 1 Pow. 382. 3 Leon. 211. Ex. (Receives £100, which I promise never to pay.

Ex. Where words of condition, are used in limitations of estates 2 Bl. 155. 1 Vent, 202. Cro. Eliz. 205. 1 Pow. 382. 3 Leon. 211.

So, if an annuity is granted for (instructing one's son, or other) service to be done the grant is conditional, though not so expressed; for otherwise the grantor would be without remedy. 1 Pow. 383. Noy, 14.

(120.)

III. The circumstances, attending the transaction, may be considered, to explain a contract, which might, otherwise, be doubtful, or be construed against the intention of the parties. 1 Pow. 385.

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Thus if A. grants an annuity to B. pro consiliis impendendo, it shall be intended to mean B's professional counsel: Counsel in law, if he is a lawyer — in physic, if a physician. 1 Pow. 385.

If one, having goods, in his own right, and as executor, grants all his goods; the grant is construed to include his own goods only. 1 Pow. 388. 3 Mod. 278. See also, Cro. Eliz. 705. Litt. Sec. 535-7.

(127.) So, where there is a recital of a particular claim in a release, followed by general words of release, the latter are qualified, and restrained, by the former. 4 Bac. 289. Hob. 74. 3 Mod. 277. L^d. Ray. 663. 1 Lev. 99. Ex. A. had a judgement on bond, against B. for £1000. B. gave A. legacy of £5, and died. A. on receiving the £5, executed to B's Executor a release, acknowledging the receipt of the legacy, and concluding with general words of release, viz, "all demands" against him as executor. The debt is not discharged. 1 Pow. 391-2. 16 Ca. at. 170. 4 Bac. 290. 3 Mod. 277. Cro. Jac. 170. Esp. 243. L^d. Ray. 235. 2 Lev. 259. Carth. 119.

Secus, (semb.) where the receipt of a particular sum is acknowledged, and no particular claim recited. Ex. £5, in full of. 3 Mod. 277. Carth. 119. 1 Show. 155. — 2 Rol. 409. Cont.

(128) "Title by Deed 50. But if, after the application of these rules, the intention remains dubious; the contract is generally to be construed most strongly against the party bound. Ex. Grantor, Covenantor, &c. The words are his. He should have explained.

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himself. 1 Vern. 395. 9 Co. 76. Plowd. 140. 161. 171. 289. Co. L. 197 a. 207. b.

Exception, where there is an ambiguity in the condition of a penal bond. Construction is in favour of obligor. For the condition is intended for his benefit, and to discharge him from a penalty, which is not favoured. 1 Vern. 397. Sy. 17. 5 Co. 22 a. 23. b.

Hence, if one is bound in a penal bond, conditioned to pay money at such a feast, and there are two feasts in the year, of that name; the money is payable at the last, not at the first. 1 Vern. 397-8. Sy. 17 a. — Secus, of a covenant, I conclude.

So, (it is holden), if one is bound in a penal bond, to make a sufficient and lawful estate in lands, by the advice of A. B.; and he makes an estate according to A. B.'s advice, whether "sufficient and lawful, or not", the penalty is saved. 1 Vern. 399. 5 Co. 23. b. Perk. sec. 775. — 2 Ch. Rep. 142. Would not Equity decree a sufficient assurance? 1 Vern. 450. Eq. Ca. ab. 8. 16. (12 J.)

Exception also, where the application of the general rule, (page, 128.) will occasion an injury to a third person. Thus, if tenant in tail makes a lease for life, not exhibiting for whose life, the life of the lessor shall be intended. Secus, the issue, or reversioner might be injured. 1 Vern. 400. Co. L. 42.

Though if made by tenant in fee, the lease must be for lessee's life. 1 Vern. 400. Co. L. 42.

Subject to these rules, the words are to be construed in the most comprehensive sense, in which they are generally understood, Ex. Covenant of warranty against the claims of "all men", is a warranty against the claims of all persons. 1 Forr. 400

(130.) And an indefinite expression is construed as a universal one, in relation to the subjects, to which it extends, unless there is some manifest reason for restraining it. 1 Forr. 401. Ex. Two joint tenants make a bill of sale of "all" their goods. It includes as well their several goods, as those holden jointly.

So, if one reciting that he owns "divers" horses, makes a bill of sale of them, "all his horses pass. 1 Forr. 405-1. 57 or 457.

"Numerical" When legal language is used, it is, regularly, to be understood according to its legal acceptation. Ex. Limitation to one's heirs, as long as he pays such an annual sum, extends to all his heirs successively. 1 Forr. 402. 2 Roll. 253. East, 25, 35. or Cro. C. 25-35. — Qu. Is not the word heirs, in this case, manifestly used, as a term of description?

So, on covenant to satisfy, after request, and due ~~proof~~, all embezzlements by covenantee's apprentice, judicial proof is intended (i.e.) proof made in an action against apprentice. 1 Forr. 405. Hob. 217.

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(131.) Contracts are to be construed according to the general intent, appearing in the whole context, though opposed to particular words in the instrument, or agreement. 1 Powr. 403. and vide "Devises" — Ex. Covenant by lessor, that he has made no former grant, by which the lease may be defeated, but that lessee may enjoy without hindrance by him, or any other person. Disturbance by any other person than lessor's p. 124. grantee, is no breach. 1 Powr. 403. Sty. 240. Mo. 58. Cro. E. 43. 615. "Covenant broken, 42"

If the thing stipulated for, is not delivered, or done, as the p. 25. contract requires, its value, at the time fixed for performance, is, in general, the rule of damages. 1 Powr. 408-9. Sty. 81-2. 1 Vern. 217. 1 Eq. Ca. ab. 221. Ekin. 405. 2 Burr. 1010.

Except where the thing has afterwards risen in value; there the value at the time of trial is the rule. 1 Powr. 409. 2 East, 211. 2 Vern. 294. — Otherwise the party claiming must suffer by the other's neglect. —

But its afterwards falling in value will not diminish the damages — (and any fluctuation in its value, before the time appointed, but which is then past, makes no difference.

(132.) If several deeds, or instruments, are made at the same time, between the same parties, respecting the same subject, they are all considered as parcel of the same contract, and to be taken together, for the purpose of construction. 1 Powr. 410. 2 Vern. 518. Ex. Absolute deed, with a defeasance separate; these make a mortgage.

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Of Annulling, discharging, and Waiving, Contracts.

(See Title "Sect. 47")

Premise: Till the terms of a contemplated contract are accepted on both sides, the contract is not consummated; and either party may retract his offer. 1 Bow. 334. 3 T. R. 148. 653. See. 1 Bow. 267. Sect. 47. — So, of a bidding at auction, before the goods are knocked down. 3 T. R. 148.

But an offer on one side accepted by the other, becomes a contract: So that either, by tendering performance, according to the terms of the agreement, may bind the other. 2 Bl. 447. Hob. 41.

(133.) Thus if A. offers B. £20, for a horse, and B. says he will take it; A. by tendering the money, or B. by tendering the horse, may close the contract, or rather bind the other. 2 Bl. 447. 2 Bac. 241. 2 Bow. 03-4. Hob. 41.

So, if on such an offer accepted, earnest is paid; or, if a future time is fixed for performance; the contract is complete, and the property vests. 2 Bl. 447-8. Noy, 42. 1 Bow. 330-1. 176. Bl. 303. 7 T. R. 04.

But if on the offer's being made and accepted, nothing more is done; (i.e. if there is no payment, nor delivery, nor earnest, nor future time appointed); and the parties separate, there is no contract. 1 Bow. 231. 2 Bl. 447. Hard. 302. 309. Sy. 30. b.

330. b. 176. Bl. 353. 2 St. 310. 3 Reeve's H. E. L. 373-4. — The bargain is waived, by both parties.

So, if A. agrees to sell goods to B. if B. within a certain time shall choose to buy them, and B. within the time, gives notice to A. that he will take them according to A's agreement, A. is not bound. For there was, at first, no contract. The agreement must bind both, or neither. But, by the terms of the first offer, B. was at liberty to accept, or refuse: So there was, then, no contract. And if A. refuses afterwards, there is no new contract. 3 T. R. 148. 653. — 1 Pow. 257, contra — 2 Bl. R. 705. Peak. Ca. 227-8. (134.)

Before a right of action has accrued on a simple contract, the parties may rescind it by merely expressing their mutual dissent. For there is no consummated right destroyed by it. 1 Parr. 412. Com. Header, 2. G. 13. 4 Bac. 265. Cro. Car. 383. Law N. P. ab. 130. 2 Lev. 144. Wats. L. P. 234. 1 Mod. 259. 12 Mod. 538. — Mutual assent is withdrawn, before either can make a claim against the other. "Assumpsit, 59."

But, after breach, it cannot be discharged, by agreement, without a release by deed; unless there is a new agreement substituted and executed; i.e. an accord and satisfaction. 1 Pow. 412-13. 410. 12 Mod. 538. Law N. P. 99 & 130. n. Cro. Car. 384. 2 Mod. 44. 259. 1 St. 209. Wats. 234.

Here there is a right consummated; and the question of assent is at an end.

(135.) Secus, as to the acceptance of a bill of exchange. Acceptor may be discharged by parol, after the bill is payable. Chitt. 83. 84. Doug. 238. 247. "Bills of Exchange" N. 48. Esb. 3.47. This seems to be a positive rule of the law-merchant.

But an agreement may, in equity, be waived by a long omission, on both sides, to execute, or claim under, it. Ex. An agreement between lord and tenant, to enclose a part of the common, delayed for 20 years. 1 Forr. 413-14. 420-1. 2 Bro. P.C. 110. 2 Eq. Ca. at 207. 9 Mod. 2.3. Here is a presumed abandonment. -

So where there was an agreement between intended Husband and Wife, that she should have her property to her separate use, and she permitted the Husband during the whole coverture to take the avails to himself, she was presumed to have abandoned the agreement. 1 Forr. 421-2. 441. 2 P. W. 82. 1 Ch. Ca. 21. Skin. 409. 3 Ch. R. 4. 117.

(136.) But this presumption may be rebutted by proof, that she was dissatisfied during coverture, and that the husband took the avails, under an engagement to fulfil the agreement. 1 Forr. 422-3. 1 Atk. 269.

And a contract consummated, and executed, may be rescinded even by one of the parties only, where there is a provision to that effect, in the original contract itself. Ex. A. sells a house to B. but on an agreement that B. may, in a certain event, return him. On the events happening, B. may rescind, and recover the money paid, as had and received. 1 Forr. 415.

Contracts.

1 T.R. 135. 7 St. 201. Comp. 818. Doug. 23. 2 East, 145. 3 Esp. 82. 1 Scam. R. 351. — This is a defeasible contract.

But, according to Powell, if A. contracts with B. for property, at such a price as C. D. shall name, the parties cannot annull it, because they have impowered a third person to perfect it. 1 Pow. 415 16. cites Bac. Max 91— 2n— What right has C. D.? This, I trust, cannot be law. Y. 143. Y. 143.

But a contract may be released after, as well as before, action accrued. (137.)

A release may be express, or tacit.— The former is a regular acquittance, by deed; the latter, by destroying, or cancelling, the instrument. 1 Pow. 416.

If he who is to be benefitted by the performance of a contract, prevents it from being executed, it is "dissolved." 1 Pow. 416. 420. 8 Co. 91-2. Co. Litt. 206. Cro. Eliz. 374. 1 Pow. 265. or rather the other party is discharged: But the party preventing is still bound to perform his part. Y. 50. 51.

And in such case, the party who was to perform, is in the same condition, as if he had actually performed. Ex. A. covenants to build a house for B. for £100, — B. prevents him from building A. may recover the £100, 1 Pow. 419-20. Co. L. 210. b. Y. 113.

(138.) So. if A. makes a feoffment to B. with condition that it shall
p. 49. be void, on A's paying £100, to B. on a certain day; and on the day, B. the feoffee, is out of the realm, so that A. cannot tender; A. may re-enter, as if the money had been paid. 1 Por. 420. Co. L. 210. b. Qu. Will not Equity consider A. as trustee of the money for B?

A contract may be annulled by a new contract of a higher nature, for the same thing. Merger. Ex. a simple contract merged in a bond. So in a judgement. 1 Por. 419. 423. 6 Co. 45. Sy. 21. b. 3 Bac. 134. Esp. D. 104. Ball. 155. 1 Burr. 9. 3 East, 251. "assumpsit 33." — For the intention of the parties is not to furnish a twofold remedy, but to substitute a higher one.

Secus, it is said, if the bond is given by a stranger. 1 Por. 423. marg. Sy. 230. b. It is then only additional security. (assumpsit, 34.) — not a substitute.

(139.) And a contract of a given degree cannot be extinguished
"Assumpsit, 80." by a new one of the same degree: i.e. the latter, as a new contract, is no bar to an action on the former. 1 Por. 424. 1 Burr. 9. Cro. Jac. 579. Cro. Eliz. 577. 817. Chitt. on Bills. 62. The latter cannot merge the former. But when pleaded by way of accord and satisfaction, see the distinctions, 1 Selw. N. P. 130. 5 Co. 117. Stra. 426. 5 East, 232. 3 H. 251. 2 J. R. 20. 2 Root, 169. "assumpsit, 60." — In this way, it may discharge the original contract

But where a contract of a lower nature is inserted in one of a higher, merely by way of recital, or to corroborate it, and enlarge the remedy, it is not merged. Ex. One "bails goods by deed," i.e. takes a deed, as evidence of the contract of bailment. (Detinue lies.) One by deed, acknowledges the receipt of money, to account; account lies — or action on the deed. 1 Bac. 218. 223. 425. 1 Bac A. 1 Roll. 118. 2 Bulstr. 258. Cro. Eliz. 844. "Hpump-st. 49. 70"

Here the simple contracts is not intended to be turned into a specialty. The latter is designed only as additional security, not as a substituted one; and may be used as evidence in an action on the former. But the party is subjected but once. "Account"

Contracts by deed, cannot be annulled or discharged, by parol. Co. ligamine C. 1 Bac. 425-6. 6 Co. 44. Yelv. 192. Cro. Jac. 254. (140.)
Nor by writing, unless sealed. 1 Saund. 291. n. 1. 2 Wils. 86. 376.

Nor by merely delivering up the instrument, to obligor &c. if obligee &c regains the possession of it. 1 Bac. 426. Cro. Jac. 99. 2 Rol. R. 110. Palm. 110

Even payment, or accord and satisfaction, "of a bond", is not a discharge: though payment &c of the "money due upon it" is sufficient. 1 Bac. 450. 1. 426. Cro. Jac 254. Yelv. 192. 7 Mod. 144. — This distinction appears to relate only to the form of pleading.

So, accord &c of the "damages" accrued on a covenant is a good discharge for the damages. 1 Bac. 427. 6 Co. 43-4. Cro. Jac. 99. 650. Yelv. 125. Cro. Eliz. 46. 2 Rol. R. 188.

(141.) "When the right and obligation, created by a contract, unite in the same person, the contract is discharged at law. 1 Por. 438. "Powers of Chancy" 14. "Executors and Administrators" Ex. Obligor becomes executor or administrator to obligee. 8 Co. 136. Sal. 300. 2 Por. 254-5. 9 Mod. 82. 10 H. 515. Lovel. 155. 3 Bac. 599. Kit. 147. Peck v. Lockwood, Sup. Court, Feb. 1808. contra, 1 Day, 226.

So if obligor marries obligee, the contract is generally annulled at law, by the legal unity of the parties. 1 Por. 438-9. 444. vide "Husband & Wife"

Secus, of a bond &c. made in contemplation of marriage, and to be executed, or performed, after the determination of the coverture. 1 Por. 442-4. Hob. 216. Cro. Jac. 571. Sal. 235. 1 L. Ray. 576. 1 Ch. Ca. 117. 5 T. R. 381. — Hobart and Holt, contra.

p. 50. 51. Contracts may also be discharged by act of the Legislature. 1 Por. 444-5. Ed. 198. 8 Mod. 51. 2 P. Wms. 218. "Municipal Law. 27" Ex. A covenant to do an act, afterwards prohibited by stat.

(142.) p. 49. So by the act of God. Ex. Lessee covenant to leave all the timber trees growing, and they are blown down by tempest. 1 Por. 446. 10 Mod. 208. 1 Co. 98. Roy. 35.

So, if A. bails a horse to B. to be returned by him and the horse dies of disease, without his fault; bailee is excused. 1 Por. 447-8. Salm. 548.

So, if A. contracts to serve B. a year, for a sum to be paid in half yearly instalments, and B. dies, after the first instalment, and before the last; B's executor is not liable for the debt last. 1 Powr. 448.

But a contract becoming partially impossible must be performed cy-près. 1 Powr. 448. Plowd. 284. "Municipal law" 28. 7.5.2.

So, if one is bound in a bond, conditioned to convey lands by a certain day; and dies before the day; the penalty is saved, tho' equity will decree a conveyance against his heir. (1 Eq. ca. ab. 168.) 7.5.2.29.

But the act of a third person, cannot, regularly, vary a contract. Ex. Bond, by A. to J.S. conditioned that B. shall appear in an action, on 8 days notice, and that if judgment is against him, A. will satisfy it. B. appears on 8 days notice, and the judgment is against him. A. is not bound to satisfy it. 1 Powr. 451. W. Jones, 441. (143.)

Though, where a contract is, by the terms of it, to take effect, or to be varied, or annulled, by the act of a third person, his act will operate upon it, as provided for, in the agreement. Ex. Contract to buy property at such a price, as J. S. shall name. The parties are bound by his decision; and if he refuses to set a price, the contract becomes void. 1 Powr. 415-16. — 7.13.6.

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